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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF ARIZONA,
Petitioner,

vs.

MARICOPA COUNTY MEDICAL SOCIETY,
MARICOPA FOUNDATION FOR MEDICAL CARE, and
PIMA FOUNDATION FOR MEDICAL CARE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is an agreement among competing physicians establishing fee schedules for their individual services a *per se* violation of section 1 of the Sherman Act?

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Denison Mattress Factory v. The Spring-Air Co., 308 F.2d 403 (5th Cir. 1962)	11
Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979)	17
Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874 (1st Cir. 1966)	11
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	6,8,14
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Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979)	17,18,19

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Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968) 13

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Lewis v. Pennington, 400 F.2d 806 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968) 11

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United States v. Vehicular Parking, Ltd., 54 F. Supp. 828 (D. Del. 1944) 11

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Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F.Supp. 118 (S.D.N.Y. 1972) 13

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Virginia Academy of Clinical Psychologists v. Blue Shield, 1980-2 CCH Trade Cas. ¶ 63,395 (4th Cir. 1980) 17

Virginia Excelsior Mills, Inc. v. Federal Trade Commission, 256 F.2d 538 (4th Cir. 1958) 11,13

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28 U.S.C. § 1337	3
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Other Authorities:	
Arizona Dep't. of Health Services, *State Health Plan of Arizona* (Fiscal Year 1977)	20
Canby and Gellhorn, *Physician Advertising: The First Amendment and the Sherman Act*, 1978 Duke L.J. 543, 578	19
Council on Wage and Price Stability, *Physicians' Fees, A Study of Physicians' Fees*, (1978)	18
Faltermayer, *Where Doctors Scramble for Patients Dollars*, Fortune Magazine 114 (November 6, 1978)	16
Goldberg and Greenberg, *The Effect of Physician Controlled Health Insurance*, J. of Health Politics, Policy and Law 2, 48 (1977)	16
Havighurst, *Controlling Health Care Costs*, J. Health Politics, Policy and Law 471 (1977)	17
Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 Duke L.J. 303	14,16,19
Havighurst and Kissam, *The Antitrust Implications of Relative Value Schedules in Medicine*, J. Health Politics Policy and Law 48 (Winter 1979)	14,19

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Other Authorities (continued:) *Page*

Horan and Nord, *Applications of Antitrust Law to Health Care Delivery Systems*, 9 Cumberland L. Rev. 685, 700 (1979) 19

Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act*, 1978 Duke L.J. 645 14,19

Kass & Paulter, Federal Trade Commission Staff Report on Physician Control of Blue Shield Plans (November 1979) 18

Note, *The Professions and Noncommercial Purposes*, 11 U.Mich. J. of Law Reform 387 (1978) .. 19

Skyrocketing Health Care Costs: The Role of Blue Shield, Hearing before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess., 4-34 (1978) 18

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Pima Foundation For Medical Care,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The State of Arizona respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on March 20, 1980, as modified April 28, 1980.

OPINIONS BELOW

The memorandum and order of the District Court entered June 5, 1979 (Appendix D), the order dated August 6, 1979 denying plaintiff's motion for reconsideration of the June 5 order and denying plaintiff's motion for summary judgment (Appendix E), the amendment to the June 5 order dated August 8, 1979 certifying that decision for interlocutory appeal (Appendix F), the preliminary order of the Court of Appeals filed November 19, 1979 (Appendix C), the opinion of Judge Sneed, the concurring opinion of Judge Kennedy and the dissenting opinion of Judge Larson[1] filed March 20, 1980 (Appendix A), the order of April 28,

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[1] Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

1980, modifying the opinion of March 20, 1980 (Appendix B), and the Court of Appeals' orders of May 30, 1980 (Appendix G) and June 18, 1980 (Appendix H) concerning rehearing, have not been reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on March 20, 1980, and modified on April 28, 1980. The State of Arizona's petition for rehearing and rehearing en banc was denied on June 18, 1980.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations is declared to be illegal.

STATEMENT OF THE CASE

The Parties

The State of Arizona, brought this action on its own behalf and as *parens patriae* on behalf of its resident natural citizens seeking declaratory and injunctive relief against the establishment and use of uniform and agreed-upon fee

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[2] While the petition for rehearing and rehearing en banc was pending, defendants filed a motion to strike that petition on the ground that it was untimely. In an abundance of caution, Arizona applied for an extension of time within which to file its petition for a writ of certiorari and Mr. Justice Rehnquist granted that motion on June 10, 1980. However, the Ninth Circuit denied the motion to strike by ordering the petition filed, thereby finding it timely. Appendix G. See Rule 13(g), Rules of the United States Court of Appeals for the Ninth Circuit. This ruling rendered moot Mr. Justice Rehnquist's order extending the time within which to file the petition.

schedules by medical doctors in violation of section 1 of the Sherman Act, 15 U.S.C § 1. The District Court's jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1337 and section 16 of the Clayton Act, 15 U.S.C. § 26.

Named as defendants were the Maricopa and Pima County Medical Societies which are associations of doctors in Arizona's two most populous counties.[3] These two medical societies had created the Maricopa and Pima Foundations for Medical Care which were also named as defendants.[4] The membership of the foundations includes more than 1,000 doctors in Maricopa County and more than 400 doctors in Pima County which are substantial proportions of the practicing physicians in those two areas.[5] The foundations' by-laws grant their members the power "to vote on the adoption of ... uniform fee schedules ... by mail ballot."[6]

Respondents Have Established and Maintained Uniform Fee Schedules for Doctors' Services

The respondents' fee schedules have two components, the "relative value" and the "conversion factor." The "relative value" is a numerical weight assigned for each type of service or procedure performed by a physician. Thus, a routine, follow-up office visit might have a relative value of 1.0, while a home visit might have a relative value of 7.0. The "conversion factor" is the dollar amount used to determine fees for a particular medical specialty. Thus, the conversion factor for surgery might be $10.00, while that for anesthesiology might be $13.00. The actual price charged for a particular procedure is determined by multiplying the

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[3] CR 106, No. 1. The Pima County Medical Society was named as a defendant but it agreed to a consent judgment after it severed its relationship with the Pima Foundation and is therefore no longer a party to this lawsuit. References are to the Clerk's Record designated in the Ninth Circuit Court of Appeals.

[4] CR 106, Nos. 1, 2, 3, 5, 6, 9, 10, 13, 16, 17, 18, 19, 21, 36.

[5] CR 106, Nos. 4, 31, 32, 35; Exhibit A to Affidavit of Alice McLain, Exhibit D-1 to CR 106.

[6] CR 106, Nos. 12, 13, 20, 21, 27, 28, 29.

relative value for that procedure by the applicable conversion factor.[7]

For more than a decade, the foundations have been the vehicle by which their members agreed upon "relative values," "conversion factors," and — in turn — agreed-upon fee schedules covering the entire spectrum of the medical marketplace.[8] To accomplish this end, the foundations polled their members and other medical associations regarding "any changes [they felt] would be appropriate."[9] The purpose was to obtain a "consensus" before distributing recommended increases in the fee schedules for a vote of the membership.[10] There were widespread discussions and agreements on acceptable fees and fee schedules.[11] Once adopted by formal vote, the fee schedules were sent both to foundation members and to other physicians in Arizona.[12] Some 85 to 95 percent of the foundations' members charge at or above the prices established by the foundations' "uniform fee schedules."[13]

The foundations also negotiated on behalf of their members on the prices for medical services to be paid by health insurers and other third parties. If an insurance company or other party agreed to pay the amounts set forth in the foundations' fee schedules, the foundations would formally endorse the health plans offered by those insurers or other third parties[14] and the foundations' members agreed to

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[7] CR 106, Nos. 49, 52-54.

[8] CR 106, Nos. 37-40, 48-50, 52-55, 57, 58.

[9] *E.g.*, Exhibits MF-27 to MF-46 to CR 7(b). See CR 106, Nos. 42, 61, 62, 64; See Exhibits MF-20 to MF-22 to CR 7(b).

[10] *E.g.*, Exhibits MF-2, MF-3 to CR 7(b); CR 106, No. 63.

[11] CR 106, Nos. 60-69.

[12] CR 106, Nos. 65-69.

[13] Exhibit B to CR 66, No. 72; CR 71 at 88.

[14] CR 106, Nos. 43-46, 48.

accept as full payment the amounts determined by the foundations' fee schedules.[15]

Although the defendants argued to the lower courts that the foundation fee schedules only established "maximum" fees, their fee schedules — by whatever name — have had an inflationary effect on prices in the medical market.[16] The foundations' fee schedules have been set at levels higher than both the average and median fees of Arizona doctors.[17] And, once the fee schedules were established, foundation members revised their prices so that some 85 to 95 percent charged prices at or above the prices established by those fee schedules. Indeed, defendants readily admitted that member doctors expected and demanded concerted price increases as a requisite for continued membership in the foundations.[18]

Proceedings Below

The District Court

The State of Arizona brought this action for declaratory and injunctive relief on its own behalf and as *parens patriae* on behalf of its resident citizens. Following completion of relevant discovery, the State of Arizona moved for partial summary judgment on liability on the ground that defen-

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[15] Appendix D at 5; CR 106, Nos. 14, 22, 30, 34, 42, 48, 70. Neither the foundations nor their members have underwritten any of the acturial risk associated with that insurance coverage; that risk was borne entirely by the insurers which financed and marketed the plans. Appendix D at 2-4; CR 106, No. 44.

[16] Indeed, the foundations sought a bond in the district court in the amount of $1.8 million per month to cover the estimated price increase they had been temporarily enjoined from effecting. CR 103 at 10. See the dissenting opinion of Judge Larson, Appendix A at 28-31.

[17] CR 106, No. 71.

[18] In both the district court and the court of appeals, respondents claimed that doctors were threatening to leave the foundations if they could not increase their agreed-upon fees, an open admission that fees for individual services were controlled by the collective membership and could not be adjusted individually by doctor or insurer. See the dissenting opinion of Judge Larson, Appendix A at 29-30; CR 103 at 5; CR 104; Appellees' Brief in the Court of Appeals at 24.

dants' price-fixing activities were a *per se* violation of section 1 of the Sherman Act, 15 U.S.C. § 1. The District Court denied this motion on June 5, 1979.[19] It reasoned that *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), established a trend away from the *per se* rule and that the *per se* rule would no longer be applicable to price-fixing agreements. Alternatively, it interpreted *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), to mean that the *per se* rule could never be applied against professionals, even in a horizontal price-fixing case such as this. Subsequent motions for reconsideration of the June 5, 1979, order and for partial summary judgment on liability based upon the rule of reason were also denied. On August 8, 1979, the district court certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) its June 5 "determination that the Rule of Reason approach should be used in analyzing the challenged conduct ... to determine whether a violation of Section 1 of the Sherman Act has occurred ...." (Appendix F.)

The Court of Appeals

A divided panel of the Court of Appeals affirmed with Judges Sneed and Kennedy each writing individual opinions and Senior District Judge Larson filing a dissent.

Relying on *Broadcast Music, Inc. v. Columbia Broadcasting Co.*, 441 U.S. 1 (1979), and distinguishing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), Judge Sneed reasoned that it was impossible to determine whether the doctors' fee schedules were *per se* unlawful without first determining whether the agreed-upon prices were unreasonably high, unreasonably low, or were higher

[19] Appendix D. The Memorandum and Order of June 5, 1979, also denied defendants' motion to dismiss the complaint and granted plaintiff's motion for partial summary judgment on the issue of subject matter jurisdiction. Only that portion of the June 5, 1979, order which addressed the issue of liability was appealed.

than other fee schedules.[20] Even if the doctors' fee schedules were viewed simply as establishing maximum prices, Judge Sneed was unwilling to hold them *per se* unlawful. He declined to follow *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), saying, "This circuit has not extended those rulings to horizontal agreements that establish maximum prices." (Appendix A at 7.)

Judge Sneed also followed the district court in saying that the *per se* rule could never be applied to the anticompetitive activities of doctors. Judge Kennedy concurred, stating that a trial was necessary before the *per se* rule could be applied. (Appendix A at 12-13.)

Senior District Judge Larson dissented. He rejected the reasoning of the District Court and Judge Sneed "that per se rules were being supplanted by greater use of the rule of reason." He concluded that this was the sort of "naked price restraint" which had previously been adjudged illegal *per se* and that there was no peculiarity of the health care industry that justified the application of a less strict legal standard to defendants' conduct. And, finally, Judge Larson rejected the defense recognized by Judge Sneed that the

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[20] Judge Sneed reasoned, "[w]e do not know how health insurers such as Blue Cross fix their fee schedules in the relevant geographic area or whether the fees they offer exceed the appellees' maximum fees .... This makes it impossible to evaluate the pro- and anticompetitive aspects of a given feature of the total structure, although these aspects must be weighted together in determining whether a per se rule, or even the Rule of Reason, should brand the questioned feature illegal." Appendix A at 8-9.

Judge Sneed went on to speculate that the doctors' agreed-upon fee schedules might be unreasonably low so as to discourage entry of new competitors or unreasonably high so as to exact a monopoly profit and that until the reasonableness of the foundations' fee schedules was determined it would be impossible to determine whether they were *per se* unlawful. Appendix A at 9-11.

reasonableness of the price is a defense to a price-fixing charge.[21]

REASONS FOR GRANTING THE WRIT

I. In Ruling that the Reasonableness of the Agreed-Upon Price Is a Defense to a Price-Fixing Charge, the Ninth Circuit Has Adopted an Unworkable Standard that Has Been Expressly Repudiated by this Court and the Other Courts of Appeals.

Certain agreements and practices by competitors are so plainly anticompetitive and pernicious that they are considered *per se* unlawful.[22] Under the *per se* rule, once such conduct is proved no further inquiry into its purposes or economic consequences is necessary to show a violation of the Sherman Act.[23] Unquestionably, agreements regarding price top the list of conduct falling under the *per se* rule; they have been considered *per se* unlawful since the inception of the rule. *Catalano, Inc. v. Target Sales, Inc.*, 100 S.Ct 1925, 1927 (1980); *National Society of Professional Engineers v. United States*, 435 U.S. at 692; *Goldfarb v. Virginia State Bar*, 421 U.S. at 785; *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489 (1950); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 291 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

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[21] Appendix A at 19-32. Judge Larson said, "I do not agree with the majority's belief that the relevant inquiry is whether fees are higher or lower as a result of the defendants' conduct. I am confident that the fee schedule does have the effect of raising prices, and that in its absence consumers would ultimately obtain less expensive medical care. The majority's emphasis on the level of fees, however, is a version of the 'reasonableness of prices' justification for price-fixing. This defense has been repeatedly rejected." (Appendix A at 30.)

[22] *E.g. National Society of Professional Engineers v. United States*, 435 U.S. at 692; *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958).

[23] *Catalano, Inc. v. Target Sales, Inc.*, 100 S.Ct. 1925, 1927 (1980); *Northern Pacific R. Co. v. United States*, 356 U.S. at 5.

Nonetheless, the Ninth Circuit rejected application of the *per se* rule in this case. In support of its result the court relied upon an analysis of the economic effect of the pricing conduct, stating, "The relevant inquiry becomes whether fees paid to doctors [absent agreed-upon fee schedules] would be less than those payable under the FMC maximum fee agreement." (Appendix A at 6.) By adopting a construction of the Sherman Act that the relevant issue in a price-fixing case is whether prices might have been lower in the absence of the conspiracy, the Ninth Circuit broke with the law as set forth both by this Court and the other courts of appeals.

A. The Ninth Circuit's Opinion Conflicts with the Decisions of this Court.

In the recent reversal of another of Judge Sneed's "rule of reason" analyses in *Catalano, Inc. v. Target Sales, Inc.*, this Court emphasized that "[i]t has long been settled that an agreement to fix prices is unlawful *per se*. It is no excuse that the prices fixed are themselves reasonable."[24] Indeed, this Court's consistent holdings have unequivocally foreclosed the inquiry into the reasonableness of agreed-upon prices which Judge Sneed's opinion mandates.[25] What offends the Sherman Act is the power to control prices by private agreement, not the relative reasonableness or unreasonableness of a particular price under variable economic conditions.[26]

The Ninth Circuit not only adopted the "reasonable price" defense that had been repeatedly rejected by this Court, it placed upon the plaintiff the burden of proving that prices would have been lower if 80 percent of the doctors in the community had not adopted and circulated

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[24] 100 S. Ct. at 1927, *citing United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 340-341 (1897).

[25] *E.g., National Society of Professional Engineers v. United States*, 435 U.S. at 689.

[26] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 212-24; *United States v. Trenton Potteries Co.*, 273 U.S. at 397.

uniform fee schedules for more than a decade. This burden of proof directly contradicts the established standard of liability. "In a civil action under the Sherman Act, liability may be established by proof of either an unlawful purpose or an anticompetitive effect."[27] The Ninth Circuit has ignored that rule and established a contradictory standard which confuses an effect on price with the requisite effect on competition and avoids the true issue, whether the agreed-upon fee schedules restrain competition.

B. The Ninth Circuit's Opinion Conflicts with the Decisions of Other Courts of Appeals.

The circuit courts of appeals, following the lead of this Court in *Socony-Vacuum* and *Trenton Potteries*, have consistently rejected any attempts to justify price-fixing combinations on the basis of the reasonableness of the

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[27] *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 243 (1980); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978). In *McLain* this Court made it clear that a plaintiff need not quantify the adverse impact of a defendant's conduct to secure injunctive relief. 444 U.S. at 243. The State of Arizona has sought only injunctive and declaratory relief in this case.

prices.[28] In ruling that the reasonableness of price may be a defense to a charge of price fixing, the Ninth Circuit has chosen to reverse single-handedly precedent that has been followed by the circuits since this Court's 1899 ruling in *Addyston Steel*.[29] For the Ninth Circuit now to say that the level of the price set by the physicians determines lia-

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[28] *See, e.g.*, First Circuit: *Kartell v. Blue Shield of Mass., Inc.*, 592 F.2d 1191, 1193 n.2 (1st Cir. 1979); *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966); Second Circuit: *Ring v. Spina*, 148 F.2d 647 (2d Cir. 1945); *Connecticut Importing Co. v. Continental Distilling Corp.*, 129 F.2d 651 (2d Cir.), *cert. denied*, 317 U.S. 664 (1942). Third Circuit: *Wholesale Auto Supply Co. v. Hickok Manufacturing Co.*, 221 F. Supp. 935 (D.N.J. 1963); *United States v. Vehicular Parking, Ltd.*, 54 F. Supp. 828 (D. Del. 1944). Fourth Circuit: *Virginia Excelsior Mills, Inc. v. Federal Trade Commission*, 256 F.2d 538 (4th Cir. 1958); *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric, Light & Power Co.*, 184 F.2d 552 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950). Fifth Circuit: *State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (5th Cir. 1978); *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976); *Denison Mattress Factory v. The Spring-Air Co.*, 308 F.2d 403 (5th Cir. 1962). Sixth Circuit: *Lewis v. Pennington*, 400 F.2d 806 (6th Cir.) *cert. denied*, 393 U.S. 983 (1968); *Barber-Coleman Co. v. Nat'l Tool Co.*, 136 F.2d 339 (6th Cir. 1943). Seventh Circuit: *Sun Oil Co. v. Federal Trade Commission*, 350 F.2d 624 (7th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966); *Henry G. Meigs, Inc. v. Empire Petroleum Co.*, 273 F.2d 424 (7th Cir. 1960). Eighth Circuit: *Sun Oil Co. v. Vickers Refining Co.*, 414 F.2d 383 (8th Cir. 1969). Tenth Circuit: *United States v. Utah Pharmaceutical Ass'n*, 201 F. Supp. 29 (D. Utah), *aff'd*, 371 U.S. 24 (1962). District of Columbia Circuit: *United States v. Nat'l Soc'y of Professional Engineers*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978).

[29] Indeed, the language of this Court's 1927 opinion in the *Trenton Potteries* case rejecting the reasonableness of prices as a defense figures prominently in the circuit court opinions. *E.g., State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 317 (5th Cir. 1978) ("Hence it is no defense that the price fixed was actually a 'reasonable price.' "); *Greene v. General Foods Corp.*, 517 F.2d 635, 648 (5th Cir. 1975) ("The reasonable price fixed today may through economic and business changes become the unreasonable price tomorrow."); *Lewis v. Pennington*, 400 F.2d 806, 812 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968) ("a combination to restrain trade by fixing prices, regardless of the reasonableness of such price, is illegal per se.").

bility in a price-fixing case is to create a new standard which directly conflicts with established law.

C. The Ninth Circuit's Opinion Promulgates an Impracticable and Unworkable Standard.

The inquiry into the relative reasonableness of agreed-upon prices which the Ninth Circuit has prescribed will place an intolerable burden on the district courts and represent an unprecedented and unwise obstacle to antitrust enforcement. As this Court has long held, tortuous case-by-case analysis of the economic peculiarities of various industries is unnecessary to determine the anticompetitive character of horizontal price agreements. Those agreements strike at the very heart of the Sherman Act and are appropriately subject to *per se* analysis without "the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government ... the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." *United States v. Trenton Potteries Co.*, 273 U.S. at 397-398.

Until this decision, it was well-understood that agreements among competitors regarding price were forbidden by the Sherman Act. By adopting a construction of the Act which makes "the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies,"[30] the Ninth Circuit has undermined the most basic tenet of the antitrust laws.

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[30] *United States v. Trenton Potteries Co.*, 273 U.S. at 398.

II. By Holding that Horizontal Maximum Price-Fixing Is Not Per Se Unlawful, the Ninth Circuit Creates a Conflict with this Court and Other Courts of Appeals.

This court has made it clear that maximum price-fixing is unlawful *per se*. "For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. at 213. *Accord, Albrecht v. Herald Co.*, 390 U.S. at 153; *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

In no other circuit can competitors avoid the *per se* rule against price-fixing by denominating their agreed price level a "maximum." To the contrary, other circuits have expressly stated that horizontal maximum price-fixing is unlawful *per se*.[31]

This Court and the lower courts have long recognized that "an identical or parallel system of maximum prices between [competitors] is likely to become a system of minimum prices."[32] When maximum prices are set by a horizontal rather than a vertical agreement the anticompetitive consequences are even greater, and the tendency for the maximum price to function as a minimum price stronger, because the interests of the cartel are unchecked by the

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[31] First Circuit: *Kartell v. Blue Shield of Mass., Inc.*, 592 F.2d 1191, 1193 n.2 (1st Cir. 1979); *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 274, 276-278 (1st Cir.)., *cert. dismissed*, 389 U.S. 801 (1967). Second Circuit: *Janel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398 (2d Cir.) *cert. denied*, 393 U.S. 938 (1968); *Vandervelde v. Put & Call Brokers & Dealers Assoc.*, 344 F.Supp. 113, 134 (S.D.N.Y. 1972). Fourth Circuit: *Virginia Excelsior Mills, Inc. v. Federal Trade Commission*, 256 F.2d 538 (4th Cir. 1958). Sixth Circuit: *Crane Distributing Co. v. Glenmore Distilleries*, 267 F.2d 343, 345 (6th Cir. 1959).

[32] *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 277-278 (1st Cir. 1967) (Coffin J., concurring). *Accord, Albrecht v. Herald Co.*, 390 U.S. at 153 ("[I]f the actual price charged under a maximum price scheme is nearly always the fixed maximum price . . . that scheme tends to acquire all the attributes of an arangement fixing minimum prices.")

countervailing interests of any third party.[33] By ruling that the monopoly power of a cartel renders the *per se* rule against price-fixing inapplicable, Judge Sneed has created an exception which strikes at the very heart of the Sherman Act. The conflict created by his decision should be resolved.

III. By Creating a Special Standard of Liability for Doctors, the Ninth Circuit Departs Radically from the Holdings of this Court and Other Courts of Appeals

A. The Judicial Exemption for Doctors Created by the Ninth Circuit Is a Radical Departure from the Holdings of this Court.

As early as 1950, this Court held that fee schedules for professional services were unlawful *per se*. *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950). In *Goldfarb v Virginia State Bar*, 421 U.S. 773 (1975), this Court ruled that members of a learned profession are not exempt from the Sherman Act. *Goldfarb* held fee schedules for legal services to be unlawful.[34] *National Society of Professional Engineers v. United States* held a professional society's rule against competitive bidding to be "illegal on its face," establishing that "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." 435 U.S. at 692. The Ninth Circuit's opinion flies in the face of those holdings.

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[33] For this reason, informed commentators have urged that fee schedules promulgated by medical societies and their foundations for medical care "should be recognized as part of a profit-maximizing strategy of a coalition of monopolists [,]" and held per se unlawful. Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 Duke L.J. 303, 377-378; Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act*, 1978 Duke L.J. 645, 678-680. *See also* Havighurst and Kissam, *The Antitrust Implications of Relative Value Studies in Medicine*, J. Health Politics, Policy and Law, 48, 68 (Winter 1979).

[34] 421 U.S. at 781-783, 786-788. *See also United States v. Utah Pharmaceutical Ass'n*, 371 U.S. 24 (1962), *affirming per curiam* 201 F. Supp. 29 (D. Utah 1962) (pharmaceutical fee schedules held *per se* unlawful).

That opinion rests upon the premise that a combination of competitors having monopoly power may engage in horizontal price agreements without violating section 1 of the Sherman Act. Focusing upon the structure of the health care industry rather than the nature of the challenged agreement, the majority held that in "an industry widely deviant from a reasonably competitive model," the price mechanism may be controlled by a cartel. (Appendix A at 6.)

This premise is a radical departure from established Sherman Act analysis, which focuses upon the nature of the challenged agreement rather than the peculiarities of particular industries. *E.g., National Society of Professional Engineers v. United States*, 435 U.S. at 688. In this case, the challenged agreement is a compact among competitors on the prices they will accept for individual services. By its very character, it suppresses an essential form of competition. This Court has consistently held that such agreements are unlawful *per se*. *Catalano, Inc. v. Target Sales, Inc.*, 100 S.Ct. at 1927-28; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. at 221.[35]

By deciding that competition does not and cannot work in the medical care industry and cartel pricing by doctors is therefore acceptable, the Ninth Circuit created an unprecedented exemption which, if allowed to stand, would be tantamount to a repeal of the statute. The Sherman Act has foreclosed argument that because of the special characteristics of a particular industry monopolistic arrangements will better promote trade and commerce than competition. *National Society of Professional Engineers v. United*

[35] The Court of Appeals' opinion unfortunately misconstrued this Court's holding in *Broadcast Music, Inc. v. Columbia Broadcasting Co.*, 441 U.S. 1 (1979), as exempting a traditional "form of minimum price fixing" from the *per se* rule. (Appendix A at 9.) But that decision established only that the blanket copyright licenses at issue did not constitute price-fixing. Indeed, this Court stated clearly in *BMI* that "agreements among competitors to fix prices on their individual goods or services are .... within the *per se* category." 441 U.S. at 8.

States, 435 U.S. at 689; *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 573-77 (1898). Because the policy decision that competition is in the public interest has been made by Congress, the judiciary cannot confer monopoly privileges on a particular trade or industry.[36]

But if the peculiarities of the medical marketplace were relevant, they would only underscore the inappropriateness of having organized medicine control the price-setting function. As Judge Larson noted in dissent (Appendix A at 24-25), much of the distortion in the medical marketplace can be traced to the anticompetitive practices of traditional medical associations, practices which this Court has already held to be fully subject to antitrust enforcement.[37] The flowering of a competitive marketplace for health care in Minneapolis-St. Paul has demonstrated the benefits of price competition among doctors.[38] Recent experience has also shown that competing insurers can take meaningful

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[36] *National Society of Professional Engineers v. United States*, 435 U.S. at 695. Judge Sneed stresses that the supply and demand functions of the medical marketplace have been distorted by high barriers to entry and government subsidies of the costs of medical care. But those characteristics are no more prevalent in the health care industry than in the petroleum industry, the railroad industry, and a host of other industries which this Court, as Congress intended, has held fully subject to Sherman Act enforcement. *E.g., Northern Pacific R. Co. v. United States*, 356 U.S. 1 (1968); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[37] *American Medical Ass'n v. United States*, 317 U.S. 519 (1943). In *American Medical Ass'n*, No. 9064 (FTC Nov. 13, 1978) (Initial decision), at 137-140, 160-166, 178-179, 259, 260, Exhibit A to CR 73, anticompetitive practices of the Maricopa and Pima County Medical Societies were included in the findings of fact. See generally Goldberg and Greenberg, *The Effect of Physician-Controlled Health Insurance*, J. of Health Politics, Policy and Law 2, 48 (1977); Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 Duke L. J. 303.

[38] See Faltermayer, *Where Doctors Scramble for Patients' Dollars, Fortune Magazine* 114 (November 6, 1978).

steps to contain health care costs in an open market protected by the antitrust laws.[39]

B. The Circuits Are Now in Conflict Regarding a Doctors' Exemption from the Sherman Act.

The Courts of Appeals for the Fifth Circuit[40] and the District of Columbia Circuit[41] have applied the *per se* rule to price restraints by professional groups.[42] In *Ballard v. Blue Shield*, 543 F.2d 1075, 1079 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977), the Fourth Circuit applied the *per se* rule to a boycott case involving a refusal of insurance coverage for chiropractic services. In a more recent boycott case involving a refusal of insurance coverage for psychological services, however, the Fourth Circuit followed the Ninth Circuit in declining to apply a *per se* rule "because of the special considerations involved in the delivery of health services." *Virginia Academy of Clinical Psychologists v. Blue Shield*, 1980-2 CCH Trade Cas. ¶ 63,395 (4th Cir. 1980). Nonetheless, the Fourth Circuit did not follow the standard of liability promulgated by the Ninth Circuit. Instead, it examined the challenged restrictions and held them unlawful under the rule of reason as enunciated in

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[39] *Cf., Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). *See* Havighurst, *Controlling Health Care Costs*, J. Health Politics, Policy & Law 471 (1977).

[40] *United States v. Texas State Bd. of Public Accountancy*, 464 F. Supp. 400, 402-403 (W.D. Tex. 1978), *aff'd*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979) (state board's rule against competitive bidding by accountants held unlawful *per se*. *Accord, Feminist Women's Health Center v. Mohammad, Inc.*, 586 F.2d 530, 546-547 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) (*per se* rule applicable to group boycott of abortion clinic by medical doctors).

[41] *United States v. National Society of Professional Engineers*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978) (professional society's ethical rule against competitive bidding held unlawful *per se*.)

[42] *See also United States v. Utah Pharmaceutical Ass'n*, 201 F. Supp. 29 (D. Utah), *aff'd*, 371 U.S. 24 (1962) (pharmaceutical association's fee schedule held unlawful *per se*); *Veizaga v. National Bd. of Respiratory Therapy*, 1977-1 CCH Trade Cas. ¶ 61,274 (N.D. Ill. 1977) (commercial practices of professional organizations held subject to *per se* liability).

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).

Thus, the circuit courts are now in conflict regarding the Sherman Act's application to doctors, with the Fifth Circuit and District of Columbia Circuit applying a *per se* rule to appropriate commercial practices of all professions, the Fourth Circuit rejecting a learned profession exemption but applying a truncated rule of reason analysis to the medical profession, and the Ninth Circuit creating an unprecedented standard of liability for the medical profession.

C. The Uncertainty Generated by the Ninth Circuit's Opinion Concerning the Sherman Act's Application to Physician Fee Schedules Should Be Resolved.

The anticompetitive consequences of fee schedules adopted by physician trade associations has aroused the concern of this Court[43] as well as the Congress,[44] the executive branch,[45] and numerous commentators.[46] Informed legal scholars have unanimously concluded that profes-

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[43] *Group Life & Heath Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 232 n. 40 (1979), and 440 U.S. at 253 (Brennan, J., dissenting).

[44] *E.g., Skyrocketing Health Care Costs: The Role of Blue Shield*, Hearing before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess., 4-34 (1978).

[45] *E.g., American Medical Ass'n*, No. 9064 (FTC, Nov. 13, 1978) (initial decision); Kass & Paulter, Federal Trade Commission Staff Report on Physician-Control of Blue Shield Plans (November 1979); Council on Wage and Price Stability, *Physicians' Fees, A Study of Physicians' Fees* (1978) (Exhibit 2 to CR 66).

[46] *See* notes 47 and 48 *infra*.

sional price restraints,[47] including the very foundation fee schedules challenged here,[48] are and should be unlawful *per se*.

In *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), this Court only recently held that provider fee agreements are subject to the Sherman Act. There, both the majority and dissenting opinions expressed concern over the anticompetitive impact of provider agreements that are dominated by physician trade associations.[49] Now the Ninth Circuit has created a judicial exemption for those very agreements on the hypothesis that the health care market has been so distorted by anticompetitive influences that established antitrust standards cannot be applied to it. (*See* Appendix A at 6; *compare with* Appendix A at 23-33 (Larson, J., dissenting.)) In defining the issue before it as "the attainment of the monopolist's goal" rather than the attainment of the Sherman Act's goal, the Ninth Circuit departed radically from this Court's construction of the Sherman Act and substituted its judgment for that of the Congress.

The uncertainty generated by Judge Sneed's opinion is particularly unfortunate because the question at issue is of grave public concern. Medical care costs account for more that 10 percent of the Gross State Product of Arizona, and disproportionate increases in those costs have distorted the

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[47] Havighurst, and Kissam, *The Antitrust Implications of Relative Value Studies in Medicine*, J. Health Politics, Policy and Law 48, 75-77 (Winter 1979); Horan and Nord, *Applications of Antitrust Law to the Health Care Delivery Systems*, 9 Cumberland L. Rev. 685, 700 (1979); Canby and Gellhorn, *Physician Advertising: The First Amendment and the Sherman Act*, 1978 Duke L.J. 543, 578; Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 Duke L.J. 303; Weller, *Medicaid Boycotts and Other Maladies from Medical Monopolists*, 11 Clearninghouse Rev. 99, 104 (1977); Note, *The Professions and Noncommercial Purposes*, 11 U. Mich. J. of Law Reform 387 (1978).

[48] Kallstrom, *Health Care Cost Control by Third Party Payors; Fee Schedules and the Sherman Act*, 1978 Duke L.J. 645.

[49] 440 U.S. at 232 n. 40; 440 U.S. at 253 (Brennan, J., dissenting).

State's economy.[50] The hardship borne by those citizens unable to obtain medical care at the artificial price level established by these fee schedules is unrecoverable and irreparable.[51] Only by the cruelest form of irony can the anticompetitive, inflationary characteristics of the health care market serve as the basis for a special rule of law which undercuts the antitrust remedies Congress has afforded to those citizens.

CONCLUSION

For the above reasons, petitioner respectfully submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

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[50] Arizona Dept. of Health Services, *State Health Plan of Arizona* (Fiscal Year 1977), Exhibit D to CR 68; CR 13, 14, 109.

[51] The court of appeals recognized the irreparable nature of that harm when it granted Arizona's motion for a stay pending appeal and enjoined respondents from establishing or disseminating new fee schedules. (Order of August 31, 1979. (Judges Choy and Wallace). *See Valenciano v. Bateman*, 323 F.Supp. 600, 603 (D. Ariz. 1971). *Cf., Memorial Hospital v. Maricopa County*, 415 U.S. 250, 259-61 (1974).

APPENDIX

Filed—MAR 20 1980
Richard H. Deane, Clerk
U.S. Court of Appeals

United States Court of Appeals
For the Ninth Circuit

No. 79-3427

STATE OF ARIZONA,

Plaintiff-Appellant,

vs.

MARICOPA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; MARICOPA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation; and PIMA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation,

Defendants-Appellees.

No. 79-3612

STATE OF ARIZONA,

Plaintiff-Appellant,

vs.

MARICOPA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; MARICOPA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation, and PIMA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation,

Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the District of Arizona

Before: SNEED and KENNEDY, Circuit Judges, and LARSON,* District Judge.

SNEED, Circuit Judge:

These consolidated appeals derive from the plaintiff-appellant's injunctive suit[1] to halt alleged antitrust violations by the defendants-appellees, two foundations for medical care (FMCs),[2] and the county medical society associated with one of them. The challenged conduct is the setting by majority vote of maximum fees that physician members may claim in full payment for health services they provide to policyholders of FMC-approved insurance plans. The appellant State of Arizona appeals from the vacation of a temporary restraining order that had already been extended without a hearing beyond the usual period. It also appeals from denial of summary judgment on the issue of liability. Pursuant to 28 U.S.C. § 1292(b) the district court certified the question whether the FMC membership agreements, which contain the promise to abide by maximum fee schedules, are illegal per se under section 1 of the Sherman Act, 15 U.S.C. § 1. We have jurisdiction to answer the certified question, but do not reach the jurisdictional issue raised by the other appeal. We affirm.

I. FACTUAL BACKGROUND

The FMCs in this case exemplify a type of organization that is beginning to play a significant part in the health services market. *See* C. Steinwald, An Introduction to Foundations for Medical Care (1971); Havighurst, *Professional Restraints on Innovation In Health Care Financing*, 1978 Duke L.J. 303, 315-16. The two challenged FMCs are not-for-profit corporations licensed as "insurance administrators" by the State of Arizona. Their activities include

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[1] Uniform State Antitrust Act. Ariz. Rev. Stat. Ann. § 44 1402.

[2] The Pima County Medical Society was also originally joined as a party but has been dismissed from the suit under a consent order.

polling their members from time to time to set upper limits on fees they may charge patients covered by insurance plans the FMCs approve. This "price fixing," the FMCs claim, subserves a general purpose of setting minimum standards and performing peer review and administrative tasks for health insurance plans. Under the heading of peer review, the foundations evaluate the medical necessity and appropriateness of treatment given and, in some instances, the use of hospital services. They also serve as agents for the underwriters, drawing funds directly from insurers' bank accounts to pay doctor's bills. Participation in the foundations is open to all physicians licensed in Arizona.

The State of Arizona charges that the foundations' fee schedules have raised members' fees above the average and median fees charged by Arizona doctors. The foundations dispute the appropriateness of the statewide figures used for the comparison, but concede that eighty-five to ninety-five percent of physicians in Maricopa County bill at or above the maximum reimbursement levels set by the county FMC.[3] The foundations point out that the State's own maximum reimbursement levels for its worker's compensation insurance program and Comprehensive Medical/Dental Program for Foster Children are higher than the foundations'. Although the State primarily argues that the FMC membership agreements are contracts to fix prices, it hints that the FMCs serve a separate anticompetitive end by aiding the exchange of price information among doctors in the counties concerned. The State contends that the FMC fee schedules are not inseparable from the professional standards review of FMC-approved insurance plans, since the foundations offer peer review and administrative services for at least one health program—the foster child program—in which prices paid the doctors are not set by themselves but by the third party payor. Although the foundations say their purpose is to provide an alternative to

[3] The record is silent concerning the comparison of Pima County FMC fee schedules with statewide average and median fees.

"closed panel prepaid health insurance plans," which are sometimes called "health maintenance organizations" (HMOs), *see* Havighurst, *Health Maintenance Organizations and Market for Health Services*, 35 Law & Contemp. Prob. 716 (1970), the record does not show that HMOs exist in Maricopa or Pima County or have been kept from entering the health service market in those counties by the operation of the FMCs.

II. THE NO. 79-3612 APPEAL.

Our jurisdiction to consider the appeal in No. 79-3427 is based on 28 U.S.C. § 1292(b). As for the appeal in No. 79-3612, we note that the State of Arizona would be entitled to reinstatement to an originally proper preliminary injunction only if the court below, in dissolving it, had committed an abuse of discretion. The controlling standard is a sliding scale correlation of the "balance of hardships" with the likelihood that a permanent injunction will be granted. *Benda v. Grand Lodge of International Association of Machinists*, 584 F.2d 308, 314-15 (9th Cir. 1978), *cert. dismissed*, 99 S.Ct. 2065 (1979); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975). The State argued that without preliminary relief, its citizens would suffer pecuniary loss, and prospective patients who could not afford a physician's care at supracompetitive prices would suffer physical injury and mental distress. On the other hand, a preliminary injunction threatened the very existence of the FMCs. Given this balance of hardships and the uncertainties attending proof of the antitrust violation, which we consider below, we cannot say that the district court would have erred in dissolving a preliminary injunction.

III. THE NO. 79-3427 APPEAL.

A.

We must approach this appeal mindful that the Supreme Court has made it clear that the determination whether an agreement violates the Sherman Act turns on its "impact on competitive conditions." *National Society of Profes-*

sional Engineers v. United States, 435 U.S. 679, 688 (1978). The fact that a restraint may for one or more reasons appear reasonable is not controlling. An unreasonable restraint that contravenes the Sherman Act may be "based either (1) on the nature and character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices." *Id.* at 690 (footnote omitted). The key, to repeat, is the agreement's impact on competition. If competition is promoted the agreement passes muster; if it suppresses or destroys competition it does not. Some agreements so often lack redeeming virtue, so frequently suppress or destroy competition, as to warrant their classification as per se unreasonable. *Broadcast Music, Inc. v. Columbia Broadcasting Co.*, 99 S.Ct. 1551, 1554 (1979). Once so classified a violation of the Sherman Act is made out merely by proving that such an unworthy agreement exists. Actual proof of its competitive impact is unnecessary. It is presumed to be anticompetitive.

The State of Arizona insists that the practice of setting maximum fees by majority vote of the members of the FMC constitutes an arrangement without redeeming virtue that suppresses and destroys competition and is thus unreasonable per se. The difficulty with Arizona's position is that this record reveals nothing about the actual competitive effects of the challenged arrangement nor do the authorities, primary or secondary, afford assurance concerning its competitive impact. In truth, we know very little about the impact of this and many other arrangements within the health care industry. This alone should make us reluctant to invoke a per se rule with respect to the challenged arrangement.

There are, however, additional reasons. Foremost among them is that we are uncertain about the competitive order that should exist within the health care industry pursuant to the Sherman Act as interpreted by the courts. Only recently have the professions been brought by the Supreme Court within the reach of the Act. *Goldfarb v. Virginia*

State Bar, 421 U.S. 773, 785-88 (1975). The guidelines by which each is govered pursuant to the Act are being written on a case by case basis.

The health care industry, moreover, presents a particularly difficult area. The first step to understanding is to recognize that not only is access to the medical profession very time consuming and expensive both for the applicant and society generally, but also that numerous government subventions of the costs of medical care have created both a demand and supply function for medical services that is artifically high. The present supply and demand functions of medical services in no way approximate those which would exist in a purely private competitive order. An accurate description of those functions moreover is not available. Thus, we lack baselines by which could be measured the distance between the present supply and demand functions and those which would exist under ideal competitive conditions.

Perforce we must take industry as it exists, absent the challenged feature, as our baseline for measuring anticompetitive impact. The relevant inquiry becomes whether fees paid to doctors under that system would be less than those payable under the FMC maximum fee agreement. Put differently, confronted with an industry widely deviant from a reasonably free competitive model, such as agriculture, the proper inquiry is whether the practice enhances the prices charged for the services. In simplified economic terms, the issue is whether the maximum fee arrangement better permits the attainment of the monopolist's goal, *viz.*, the matching of marginal cost to marginal revenue, or in fact obstructs that end.

Approached in this manner, the weakness of Arizona's suggestion that a per se rule be employed here becomes apparent. To assume that the arrangement in question wrongfully increases fees requires the further assumption that the FMCs are but devices to enable the member doctors to capture a greater share of potential monopoly profit,

which their monopoly power makes available, than otherwise would be possible. This is an assumption we are not prepared to make on the basis of the record before us.

Our reluctance also has other roots. We are not, for example, prepared to believe without some evidence that a conspiratorial exploitation of monopoly power by the doctors would be supinely accepted by the insurance carriers. Nor are we prepared to reject out of hand the claim that a ceiling on fees does in fact reduce them. No one suggests that peer review is suspect, although it too purports to reduce the aggregate costs of medical services by curtailing unnecessary treatment. If it is proper to assume a conspiratorial exploitation with respect to maximum fees, why should a different assumption be applicable to peer review? Our belief is that neither assumption is appropriate.[4]

We are by no means unaware that economic motives frequently lie behind even the best of good works. We are, however, simply not prepared to brand the appellee's conduct as "price-fixing" and thus a per se violation of the Sherman Act on the basis of an unsupported *belief* that fee enhancement is the likely consequence of the appellees' maximum fee arrangement. We say this in full recognition that the appellee's conduct involves some exchange of price information from which an agreement to raise or maintain

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[4] Two Supreme Court decisions have held maximum resale price agreements to be illegal per se. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *see also Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir.), *cert. dismissed*, 389 U.S. 801 (1967). This circuit has not extended those rulings to horizontal agreements that establish maximum prices. For an argument that the extension is proper, see L. Sullivan, Antitrust 210 (1977). A consequence of the extension, however, would be to moot an aspect of the currently lively debate concerning "limit pricing" and predatory price-cutting. It can hardly be said, then, that a per se rule forbidding horizontal maximum price agreements is well settled. It is arguable that this case does not present the issue for our decision. The FMC membership agreements do not set price ceilings for given services across the board but only limit the fees recoverable from certain patients, namely, those covered by FMC-approved insurance policies.

prices might be implied if sufficient corroborative facts were shown. *See American Column & Lumber Co. v. United States*, 268 U.S. 563, 586 (1925). An agreement of that nature properly proven would violate section 1 of the Sherman Act. To affix the per se label to appellees' conduct is, however, once more to substitute an unsupported belief for proper proof.

We acknowledge that it is quite possible, perhaps even probable, that the price ceiling serves the purpose of forestalling government price control that could force prices to an even lower level. This does not make the ceiling a violation of the Sherman Act. To eschew profit maximization in order to forestall price control is neither irrational nor, under the facts of this record, in violation of the Act. We observe in passing that only a government lost in an impenetrable legal maze, after having contributed substantially to the creation of monopoly conditions, would threaten price control if full monopoly profits are reaped and enforcement of the antitrust laws if private means are used to prevent the harvest.

B.

Appellant argues that our position is impermissible because under *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), any collective effort to "tamper with price structures" offends antitrust policy. The argument, while by no means fanciful, overlooks *Broadcast Music* which held that a traditional form of minimum price fixing in the market for music under copyright was not illegal per se. *Broadcast Music* reminds us that whether to classify something as " 'per se price fixing' " will often, but not *always*, be a simple matter." 99 S.Ct. 1557 & n.14 (emphasis added).

The issue whether to so classify the price schedules in this case is by no means "a simple matter." In addition to the uncertainties already referred to, we do not know how health insurers such as Blue Cross fix their fee schedules in the relevant geographical area or whether the fees they of-

fer exceed the appellees' maximum fees. We are not informed by the record of the identity of, or the role played by, the various institutional components that compete in the relevant market. One may guess that doctors, both within and without the FMC structure, insurance carriers, hospitals, and perhaps HMOs, operate within the market; nonetheless, the record reveals nothing about the nature and extent of the competition, between them. This makes it impossible to evaluate the pro- and anticompetitive aspects of a given feature of the total structure, although these aspects must be weighed together in determining whether a per se rule, or even the Rule of Reason, should brand the questioned feature illegal.[5]

Our unwillingness to employ a per se rule in this case is not overcome by the suggestion of a well-informed commentator that FMCs could and, perhaps in some instances, have unfairly prevented HMOs from recruiting subscribers and thus gaining entry to the relevant health service market. Havighurst. *Health Maintenance Organizations and the Market for Services*, 35 Law & Contemp. Prob. 716, 767-76 (1971). The thought is that FMCs, far from extracting the maximum profit possible, have set fees sufficiently low to discourage entry by potential competitors such as HMOs. *See Knutson v. Daily Review, Inc.* 548 F.2d 795, 814 n.21 (9th Cir. 1976) ("If the fixed maximum price is higher than cost but lower than a price that would permit new entrants or smaller scale competitors to operate (i.e., a 'limit price'), then, although not predatory, it could support other efforts to acquire a monopoly") (dictum). Some have questioned

[5] When a questioned business practice affects more than one sphere of competition, the Rule of Reason of course recognizes that the enhancement of competition in one sphere may offset the weakening of competition in another. Sometimes, for example, "both interbrand and intrabrand competition must be considered . . ." *First Beverages, Inc. v. Royal Crown Cola Co.*, Nos. 77-3536, 78-1050 (9th Cir. Jan. 30, 1980), slip op. at 1809 n.8, although not every case requires extensive analysis of these multiple effects or jury instructions concerning them. *Id* at 1809-11. Here the novelty of the market or markets and the inadequacy of the record make an inquiry into the affected areas of competition essential.

the theory on which the thought rests. *See* RF. Posner, Antitrust Law: An Economic Perspective 115 n.50 (1976); for a detailed critique of the limit-price theory, *see* Markovits, *Potential Competition, Limit Price Theory, and the Legality of Horizontal and Conglomerate Mergers Under the American Antitrust Laws*, 1975 Wis.L.Rev. 658. Doubt springs from the fact that the returns to those possessing monopoly power from pursuing a policy of fixing prices sufficiently low to discourage the entry of competitors are likely to be less over the long run than those resulting from a pricing policy that permits the capture of monopoly profits. In the latter case, high profits likely will draw competitors whose entry will drive prices down to a point approximating that which would have been set by a policy designed to bar entry. Thus, either policy over time yields approximately the same price level, the difference being that in the latter case available monopoly profits were captured while in the former they were foregone. Knowingly to forego such profits is irrational. This so-called "limit-price" theory, therefore, cannot be accepted as the foundation of a per se rule.

Our conclusion in this regard does not conflict with the general disapproval of predatory practices, of which predatory pricing is the most commonly examined species. *See, e. g., Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); R. Posner, Antitrust Law: An Economic Perspective 184-96 (1976); L. Sullivan, Handbook of the Law of Antitrust 108-13 (1977); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L.Rev. 697 (1975); Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 Mich.L.Rev. 373, 435-40 (1974); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L.J. 284 (1977). As these authorities illustrate, however, there is nothing like agreement concerning the signs by which predation is

identifiable.[6] Without deciding what the proper identifying signs may be, we are confident that none is revealed by this record. Moreover, the evil of predatory pricing is that it makes possible an ultimate capture of monopoly profits. Were prices maintained at the predatory level indefinitely the case against predatory pricing would more resemble that against suicide than that against monopolies.

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[6] There is no disagreement about what constitutes predatory pricing. It is "pricing at a level calculated to exclude from the market an equally or more efficient competitor," R. Posner, *supra*. at 188, "conduct which has the purpose and effect of advancing the actor's competitive position, not by improving the actor's market performance, but by threatening to injure or injuring [competitors], so as to drive them or keep them out of the market, or force them to compete less effectively," L. Sullivan, *supra*, at 108. But while this definition of predatory behavior stresses anticompetitive intent, business tactics are exceptionally resistant to state-of-mind analysis. Antitrust theorists have therefore gravitated toward purely economic definitions. For example, Areeda and Turner propose that the courts regard as predatory pricing, policies that yield returns below average or marginal cost, whichever is lowest. Areeda & Turner, *supra*. Since marginal and average cost include a normal return on capital, however, the difficulties of determining the normal return for the firm in question make this proposal a demanding one for the courts to implement. *See* L. Sullivan, *supra*, at 110; R. Posner, *supra*, 191-93. Posner believes that a modified form of the below-cost pricing criterion is appropriate. *Id* at 188-91 Although this court has entertained the possibility of proving predation by marginal or average cost statistics, *Hanson v. Shell Oil Co.* 541 F.2d 1353 (9th Cir. 1976), we have not held that mode of proof to be exclusive, *Id.* at 1358 ("[Predatory pricing] *could* be shown by evidence" of below cost pricing (emphasis added)); *cf. Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977). *cert. denied.* 439 U.S. 829 (1978) ("Thus, as stated in *Hanson*, average variable cost can be used as evidence of marginal cost."). More recently, the court has recognized "that refinement of the marginal or average variable cost test will be necessary as future cases arise." *California Computer Products, Inc. v. International Business Machines Corp.*, No. 77-1563 (9th Cir. June 21, 1979), slip op. at 2191 (citing Williamson, *supra*, among other recent commentators on predatory pricing). Since there is no contention before us that predation has occured, we note only that our skepticism about limit-pricing in no way discredits theories of predation.

Our holding does not conflict with *Group Life and Health Insurance Co. v. Royal Drug Co.* 99 S.Ct. 1067 (1979). The practice of which the appellant complains in this case is not "the business of insurance." No more was held with respect to the practice involved in *Royal Drug.* The issue whether that practice violated the antitrust laws expressly was not decided. Here we confront precisely that type of issue and merely hold that the challenged practice is not a per se violation.

We conclude by observing that we draw comfort from the Supreme Court's reiteration in *National Society of Professional Engineers,* 435 U.S. at 696, n.22 of its statement in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975) that marketing restraints that regulate professional competition may pass muster under the Rule of Reason even though similar restraints on ordinary business competition would not. We believe this recognizes that a restraint may serve the public, the transcendent end of all professions, even though its presence in a purely commercial setting would violate the antitrust law. *See Professional Engineers, supra,* 435 at 696 & n.22; *Boddicker v. Arizona State Dental Ass'n.,* 549 F.2d 626 (9th Cir. 1977). There is sufficient probability of the challenged practice in this case being sheltered by this principle to justify our refusal to brand it as a per se violation.

Affirmed.

KENNEDY, Circuit Judge, concurring:

I agree with my Brother Sneed that we know too little about the effects on competition produced by the practices here in question to brand them per se violations of the Sherman Act at this point. "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations ..." *United States v. Topco Associates, Inc.* 405 U.S. 596, 607-08 (1972). We lack that experience in judging the maximum reimbursement schedules present here; and I am unable, for the reasons set forth in Judge Sneed's opinion, to say that these

schedules "on [their] face [have] the effect, or could have been spurred by the purpose, of restraining competition among the individual [physicians]." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 13 (1979); *Northern Pac. R. Co. v. United States*, 356 U.S. 1 (1958).

While the Supreme Court has rejected any blanket antitrust exemption for learned professions, *see, e. g., Goldfarb v. State Bar*, 421 U.S. 773, 785-88 (1975), it has indicated that the antitrust laws may have somewhat different applications to some trade practices in those areas. *See, e. g., National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 n.22 (1978). Per se rules should be derived from considerations of economic impact in particular cases illustrating the category of prohibited acts, and therefore a trial is appropriate to explore further the impact on competition of the challenged reimbursement schedules.

This is not to suggest, however, that I have found these reimbursement schedules to be per se proper, that an examination of these practices under the rule of reason at trial will not reveal the proscribed adverse effect on competition, or that this court is foreclosed at some later date, when it has more evidence, from concluding that such schedules do constitute per se violations. The evidence adduced at trial may very well show that the theories which Judge Sneed refutes in the abstract do have an empirical foundation and that the challenged practices have the proscribed effect of suppressing rather than promoting competition. *See National Society of Professional Engineers v. United States, supra*, 435 U.S. at 691.

There does not now appear to be a controlling or definitive analysis of the market impact caused by the arrangements under scrutiny in this case, but trial may reveal that the arrangements are, at least in their essentials, not peculiar to the medical industry and that they should be condemned. For the foregoing reasons I concur.

LARSON, Senior District Judge (dissenting).

I respectfully dissent from the majority decision. The defendants' conduct constitutes price-fixing that is per se illegal under the Sherman Act. In addition, the trial court abused its discretion in refusing to continue or grant the preliminary injunction.

I.

We are presented with two consolidated appeals by the State of Arizona. No. 79-3427 was brought pursuant to 28 U.S.C. § 1292(b). The controlling question of law certified was whether the challenged practice should be judged under a per se rule or by the rule of reason. No. 79-3612 is an appeal from a district court order of July 17, 1979, which in essence was a refusal to continue an injunction. The majority opinion reaches only the first appeal, noting, however, that it cannot be said that "the district court would have erred in dissolving a preliminary injunction." I believe both appeals can and must be treated fully.

The complaint in this action was filed on October 17, 1978. Arizona moved for a preliminary injunction on October 25, 1978, but no hearing was held on this motion before the events which led to these appeals. On November 2, 1978, the parties agreed to an order establishing the sequence of discovery and pretrial motions. Paragraph 6 of this order forbade the defendants from engaging in allegedly illegal practices until the preliminary injunction motion was heard, or May 1, 1979, or until further order of the court. On April 20, 1979, Arizona moved to maintain the status quo past May 1, 1979. Defendants objected, but on April 30, 1979, the trial judge decided that Paragraph 6 of the November 2, 1978, order would remain

in effect pending further order of the court. In a June 5, 1979, order and memorandum, defendants' motion to dismiss the complaint and plaintiff's motion for summary judgment on the issue of liability were denied by the district court. It was in this order that the district judge stated that the challenged conduct would be analyzed under the rule of reason rather than by a per se rule.

Following this decision, the defendants moved to vacate the April 30 order. On July 17, 1979, the district court granted this request. The district court appeared to view the continuation of Paragraph 6 of the November 2, 1978, order as either a temporary restraining order or "because of the lapse of time and the preparation of the parties, as an application for a preliminary injunction."

This July 17, 1979, order was appealed pursuant to 28 U.S.C. § 1292(a)(1), which allows review of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Grants or denials of temporary restraining orders are not appealable under this statute. *In the Matter of Vuitton et Fils S.A.*, 606 F.2d 1, 3 (2d Cir. 1979); *Levesque v. State of Maine*, 587 F.2d 78, 79 (1st Cir. 1978); *Sohappy v. Smith*, 529 F.2d 570, 572 (9th Cir. 1976); 9 Moore's Federal Practice ¶ 110.20[5] (2d ed. 1975). However, often the characteristics and circumstances of an order, not how it is denominated, determine whether it is appealable. *See Sampson v. Murray*, 415 U.S. 61, 85-88 (1974); *Melanson v. John J. Duane Co.*, 605 F.2d 31, 33 (1st Cir. 1979); *Clements Wire & Mfg. Co. v. NLRB*, 589 F.2d 894, 896-97 (5th Cir. 1979); Moore's Federal Practice, *supra*. This order was continued for over eight months. That fact alone might require that it be treated as a preliminary injunction. *See Sampson v. Murray*, *supra*, at 86. The district court believed it could be so viewed, and the defendants, when requesting vaction of the order, argued that it was in

effect a preliminary injunction. In addition, there had already been extensive consideration of the merits by the district court. The July 17 order was the denial or dissolution of a preliminary injunction and is therefore appealable.

The general standard for reviewing grants or denials of preliminary injunctions is whether the trial court abused its discretion. *Miss Universe, Inc. v. Flesher,* 605 F.2d 1130, 1132-33 (9th Cir. 1979); *City of Anaheim v. Kleppe,* 590 F.2d 285, 288 n.4 (9th Cir. 1978). A decision based on an erroneous legal premise would also be reversible. *Miss Universe. Inc. v. Flesher, supra; Kennecott Copper Corp., v. Nevada,* 572 F.2d 1349, 1357 n.3 (9th Cir. 1978); *Klaus v. Hi-Shear Corp.,* 528 F.2d 225, 231 (9th Cir. 1975). *See Chromalloy American Corp. v. Sun Chemical Corp.,* Nos. 79-1741, 79-1757, slip op. at 7 (8th Cir. Dec. 14, 1979); *State of Kansas ex rel. Stephan v. Adams,* 608 F.2d 861, 867 n.5 (10th Cir. 1979); *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.,* 604 F.2d 755, 758 (2d Cir. 1979). As discussed in detail below, I believe the district court was legally wrong in declining to apply a per se rule to defendants'

conduct.[1] Even if the district court was correct in applying the rule of reason, it was, however, an abuse of discretion to refuse to prolong the injunction and the status quo.

The test for awarding preliminary injunctions has undergone considerable evolution in recent decisions.[2] This history is traced in *City of Anaheim v. Kleppe, supra.* Currently there are two tests which are viewed as the extremes

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[1] Although the district court's June 5, 1979, memorandum is well reasoned, it displays a misperception of the current state of antitrust analysis. The district court felt that per se rules were being supplanted by greater use of the rule of reason. A careful survey of recent decisions discloses that not only are per se rules continuing to be applied in traditional areas like price-fixing, but they are also being extended to encompass new anticompetitive practices. The Supreme Court has continually reaffirmed the value of per se rules, especially when applied to conduct affecting pricing. Maximum price-fixing clearly has been and should be regarded as per se illegal, particularly in a horizontal context. *See* text, *infra* at p. 4. The Kallstrom article referred to by the district court takes the position that maximum price setting among individual medical providers should be per se illegal, especially when done by a Foundation for Medical Care. Kallstrom, *Health Care Cost Control by Third-Party Payors,* 1978 Duke L.J. 645, 680-83. Finally, the district court felt that professionals were accorded special treatment under the antitrust laws. Supreme Court and other decisions, however, indicate that when commercial practices of a profession are at issue, per se rules may be applied, particularly if the challenged activity affects price. *See* text, *infra,* at pp. 5-6. The combined effect of all these errors requires that the district court at least be ordered to reconsider its refusal to continue the preliminary injunction.

[2] I have concentrated on the general standards for preliminary injunctions but it should be noted that § 16 of the Sherman Act, 15 U.S.C. § 26, also governs preliminary relief under the antitrust laws. Much of the procedural difficulty here could have been avoided by closer adherence to the requirements of Rule 65 of the Federal Rules of Civil Procedure, particularly after defendants objected to the April 30 continuation of Paragraph 6.

of a continuum.[3] The moving party must show either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to create a fair ground for litigation and a balance of hardships tipping decidedly toward the moving party. *Anderson v. United States*, No. 77-3222, slip op. at 1022 (9th Cir. Nov. 28, 1979); *Miss Universe, Inc. v. Flesher, supra*, at 1134. As the balance of hardships increases in favor of the moving party, the necessity of showing a likelihood of success on the merits decreases. *City of Anaheim v. Kleppe, supra*. A final factor present in the decision whether to award preliminary relief is an evaluation of where the public interest lies. *City of Anaheim v. Kleppe, supra*.

The district judge declined to continue the injunction because he thought the balance of harms favored defendants. The defendant Foundations claimed only that physicians were threatening to withdraw if they could not increase the fees they recovered from third-party payors. A simple alternative was available for defendants to preserve their membership and avoid injury. They could suspend the requirement that doctors accept the fee schedule amounts as the maximum payment for treatment of insurance-covered patients. The Foundations could continue to perform their other functions. The physicians who wished to raise their fees could do so, and would have no reason to leave the Foundations. In the event that a favorable result for the physicians is obtained in this litigation, the Foundations could proceed to establish a new fee schedule and

[3] This continuum approach has been utilized by several circuit courts of appeals. *See Chromalloy American Corp. v. Sun Chemical Corp., supra; Maryland Undercoating Co. v. Payne*, 603 F.2d 477, 481 (4th Cir. 1979); *Florida Medical Assoc. v. United States Dept. of Health*, 601 F.2d 199, 202 (5th Cir. 1979); *Jackson Dairy, Inc. v. H. P. Hood & Sons*, 596 F.2d 70, 72, 74 (2d Cir. 1979); *Citizens Energy Coalition of Ind. v. Sendak*, 594 F.2d 1158, 1162 (7th Cir. 1979); *Doe v. Colautti*, 592 F.2d 704, 706 (3rd Cir. 1979). One of these courts has suggested that the balance may also work in the opposite direction; the greater the movant's likelihood of success, the less the balance of harms must swing in his favor. *See Maryland Undercoating Co. v. Payne, supra, 481 n.8.*

reinstitute the requirement that its member physicians adhere to the schedule. This procedure would avoid the only harm a preliminary injunction would cause the defendant Foundations: loss of membership.

Arizona claimed that promulgation of a new fee schedule would mean substantial increases in medical costs for its residents. The district court believed that any harm to those whom Arizona represents could be compensated by money damages. Arizona is not seeking damages and in any event the expense of proving and disbursing the increased charges to individual patients would likely be greater than the amount of damages recovered. The additional medical costs to Arizona citizens would be unrecoverable and irreparable. The balance of harms tips strongly in Arizona's favor. In addition, the public interest would best be served by continuing to enjoin the defendants' from preparing and using a new fee schedule. The fact that it is Arizona, the primary regulator or the health industry in that State and guardian of its citizens' interests, which has challenged defendants' conduct is also entitled to weight.

The district court also felt Arizona had not established a likelihood of success under the rule of reason, but it appears to me that plaintiff has shown a strong probability of success, even if forced to proceed under this standard. Fee-setting in this context is so obviously anticompetitive that it must be found to violate the Sherman Act. It is unquestioned that Arizona has at least raised serious questions about the legality of defendants' behavior. Therefore, wherever one chooses to stop along the continuum of preliminary injunction factors, Arizona is entitled to relief.

II.

I turn now to the standard of liability by which the challenged activity should be measured. This inquiry can be handled most efficiently if guided by three questions. First, is this a type of "naked price restraint" which has previously been adjudged per se illegal? If so, then only some peculiarity of the health care industry can justify applica-

tion of a lesser standard. *See e. g., Silver v. New York Stock Exchange*, 373 U.S. 341, 347 (1963). Second, if this is not a form of conduct traditionally found to be per se illegal, does it possess such harmful features that it should now be declared per se illegal? *See, e. g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 n.33 (1979). Third, even if the rule of reason must be applied, is the practice so plainly anti-competitive that only a truncated rule of reason analysis need be carried out? *See, e. g., National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). The third question is relevant here because if answered in the affirmative, the likelihood of plaintiff's success, and the propriety of granting preliminary relief, would be increased.

Defendants formulated and dispersed relative value guides and conversion factor lists which together were used to set an upper limit on fees received from third-party payors. It is clear that these activities constituted maximum price-fixing by competitors. Disregarding any "special industry" facts, this conduct is per se illegal. *Albrecht v. Herald Co.*, 390 U.S. 145, 151-53 (1968); *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1951); *Kartell v. Blue Shield of Mass., Inc.*, 592 F.2d 1191, 1193, n.2 (1st Cir. 1979); *Quinn v. Mobil Oil Co.*, 375 F.2d 273, 274, 276-78 (1st Cir.), *cert. dismissed*, 389 U.S. 801 (1967); *Crane Distributing Co. v. Glenmore Distilleries*, 267 F.2d 343, 345 (6th Cir. 1959); *Vandervelde v. Put & Call Brokers & Dealers Assoc.*, 344 F.Supp. 118, 134 (S.D.N.Y.1972). Precedent alone would mandate application of the per se standard.

I find nothing in the nature of either the medical profession or the health care industry that would warrant their exemption from per se rules for price-fixing. Although the Supreme Court has distinctly rejected a broad learned professions exemption from the antitrust laws, *National Society of Professional Engineers v. United States supra*, at 696; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975), confusion remains over the extent to which these professions are or should be subject to per se rules. *See*

generally Bauer, Professional Activities and the Antitrust Laws, 50 N.D. Lawyer 570 (1975); Note, *The Professions & Non-commercial Purposes*, 11 U.Mich.J. of L. Reform 387 (1978); Note, *The Antitrust Liability of Professional Associations After Goldfarb*, 1977 Duke L.J. 1047.

In *Goldfarb*, the district court found fee-setting by attorneys to be per se illegal. 355 F.Supp. 491, 493 (E.D. Va. 1973). The Supreme Court stated that a "naked agreement was clearly shown, and the effect on prices is plain," and that "respondents' activities constitute a classic illustration of price fixing." 421 U.S. at 782, 783. Although not explicit, a valid interpretation of this language is that the Supreme Court agreed that the per se rule was applicable. Certainly this is not a rule of reason analysis. The Supreme Court did add a caveat that the "public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today." 421 U.S. 788-89 n.17. The situation with which the Court was confronted in *Goldfarb*—price-fixing—is the same practice challenged in this case.

National Society of Professional Engineers v. United States, supra, is also not totally explicit on the standard applied. Both the district court, 404 F.Supp. 457, 460-61 (D.D.C.1975), and the court of appeals, 555 F.2d 978, 983 (D.C.Cir. 1977), found the ban on competitive bidding to be per se illegal. Both courts believed this result was consonant with *Goldfarb*. The Supreme Court recognized that the lower courts had found the practice unlawful on its face, 435 U.S. at 686, and it agreed with that assessment, 435 U.S. at 692-693. The central lesson of the case appears to be that when the nature and character of an agreement among professionals is plainly anticompetitive, no extended analysis is necessary to find it forbidden under the Sherman Act. I believe that in the wake of *Goldfarb* and *National Society of Professional Engineers*, the Supreme

Court would be willing to apply per se rules to professional price tampering and that this Court should not hesitate to do so.

Such an approach would be in accord with the rulings of other courts. *See United States v. Texas State Board of Public Accountancy*, 464 F.Supp. 400, 402-03 (W.D.Tex. 1978) (competitive bidding ban is per se illegal), *aff'd*, 592 F.2d 919 (5th Cir.), *cert. denied*, 100 S.Ct. 262 (1979); *Veizaga v. National Board for Respiratory Therapy*, [1977-1] Trade Cases (CCH) 61,274 (N.D.Ill.1977) (per se rule applied to commercial activity of a profession). Commentators have suggested that the commercial aspects of the professions, including medicine, should be subject to customary per se rules. *See* Horan & Nord, *Application of Antitrust Law to the Health Care Delivery System*, 9 Cumberland L.Rev. 685, 700 (1979) Weller, *Medicaid Boycotts & Other Maladies from Medical Monopolists*, 11 Clearinghouse Rev. 99, 104 (1977); Note, *The Professions & Non-commercial Purposes, supra*, at 399 and n.36, 414-15. Several authors have advocated that price-fixing by physicians, including maximum fee-setting, be declared per se illegal. *See* Havighurst & Kissam, *The Antitrust Implications of R.V. Studies in Medicine*, 4 J. Health Politics, Policy & Law 48, 75 (1979); Horan & Nord, *supra*, at 709; Kallstrom, *Health Care Cost Control by Third-Party Payors*, 1978 Duke L.J. 645, 683.

The defendants' price-fixing has a wholly commercial nature and has no relation to any public service aspect of the medical profession, or to any other professional objective of the defendants; nor does it appear to be motivated by a desire to benefit consumers. Eliminating the fee-setting would not inhibit defendants from continuing to perform peer review, quality control, or other permissible

functions. These activities are entirely separable from the fee-setting. That physicians are the participants in this price-fixing scheme does not exempt it from per se illegality.

A second exemption which might be advanced is one for the health care industry. Of course, Congress has not provided such an exemption and the courts should be extremely reluctant to imply one. *Goldfarb v. Virginia State Bar, supra,* at 787. It is not necessary here to strike any broader rule than to deny special treatment to price-fixing by physicians. Whether other practices in the health care business are due deferential handling can be decided when those activities are placed at issue.

Much attention has recently been focused on health care delivery, with particular concern over the seemingly uncontrollable increases in health care costs. Congress has examined the serious problems existing in the industry and has studied the potential benefits of introducing competitive forces.[4] Government agencies also have shown interest in the competitive state of health care.[5] A number of articles and books have been written on the sub-

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[4] *See* Staff of Perm. Subcomm. on Investigations of Senate Govern. Affairs Comm., 96th Cong., 1st Sess., *California Relative Value Studies: An Overview* (Staff Study 1979); Staff of Subcomm. on Oversight & Investigations of House Comm. on Interstate & Foreign Commerce, 95th Cong., 2d Sess., *Conflicts of Interest on Blue Shield Boards of Directors* (Comm. Print 1978); *Skyrocketing Health Care Costs: The Role of Blue Shield:* Hearings Before the Subcomm. on Oversight & Investigation of the House Comm. on Interstate & Foreign Commerce, 95th Cong., 2d Sess. (1978); *Competition in the Health Services Market, Pts. 1-3:* Hearings Before the Subcomm. on Antitrust & Monopoly of Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (1974).

[5] *See In the Matter of A.M.A.*, F.T.C. Docket No. 9064, Trade Reg. Rpts. No. 409, pt. II (CCH) Oct. 30, 1979); Federal Trade Commission. *Competition in the Health Care Sector* (1978) (collection of papers from F.T.C. conference); Kanwit, *FTC Enforcement Efforts Involving Trade & Professional Associations,* 46 Antitrust L.J. 640 (1978); Palmer, *Antitrust Activities By the FTC in the Health Field,* 37 Fed.B.J. 40 (1978) (lists FTC relative value guide cases on pages 46-47).

ject.[6] The Supreme Court has even noted the problem in a recent case, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 232 n.40 (1979).[7]

The health care industry currently does not display significant competitive conditions. There are many reasons for this situation, including the tax laws, the effects of insurance, and, as the majority notes, governmental regulation and financial entanglement. It is also undoubtedly true that a major factor has been the active suppression of competition by traditional medical associations.[8] The restraints fostered by these groups are and should be subject to conventional antitrust scrutiny. Although market forces may be bridled in part by factors beyond the reach of the Sherman Act, this does not prevent utilization of the law to remove additional constraints which normally are illegal. Partial governance by competitive forces can create benefits even though anticompetitive forces remain in the market.

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[6] *See* P. Proger, *Antitrust in the Health Care Field* (1979); M. Thompson, *Antitrust & the Health Care Provider* (1979); Borsody, *The Antitrust Laws & the Health Industry*, 12 Akron L.Rev. 417 (1979); Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 Duke L.J. 314; Havighurst & Kissam, *supra;* Horan & Nord, *supra;* Kallstrom, supra; Kessel, *Price Discrimination in Medicine*, 1 J.L. & Econ. 20 (1958); Rosoff, *Antitrust Laws & the Health Care Industry*, 23 St. Louis, U. L.J. 446 (1979); Weller, *supra.* Note, *Application of Antitrust Laws to Anticompetitive Activities by Physicians.* 30 Rutgers L.J. 991 (1977).

[7] "[E]xempting provider agreements from the antitrust laws would be likely in at least some cases to have serious anticompetitive consequences. Recent studies have concluded that physicians and other health-care providers typically dominate the boards of directors of Blue Shield plans. Thus, there is little incentive on the part of Blue Shield to minimize costs, since it is in the interest of the providers to set fee schedules at the highest possible level. This domination of Blue Shield by providers is said to have resulted in rapid escalation of health-care costs to the detriment of consumers generally."

[8] See Havighurst, *supra*, at 315-321; Havighurst & Kissam, *supra*, at 58, 68; Kessel, *supra*, at 32; Palmer, *supra*, at 42-3.

It is not our task to determine what the competitive order should be. The Sherman Act requires that absent very unusual circumstances market forces should be given free rein. The policy decision that competition is in the public interest has been made by Congress and must be enforced by the courts. *National Society of Professional Engineers v. United States, supra,* at 692, 695. Furthermore, "[E]arly cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. That kind of argument is properly addressed to Congress . . ." *Id.* at 689 (cites omitted).

We are confronted here with a challenge to behavior usually found per se illegal under the antitrust laws. Nothing in the arguments advanced by defendants or by the majority opinion convinces me that application of the procompetitive policy of the Sherman Act to physician price-fixing will be harmful to the health care business or to its consumers. On the contrary, vigorous enforcement of the law could encourage new forms of health care delivery that would significantly benefit the public.[9] Some initial steps toward reform have been made in medicine. *See In the Matter of A.M.A.*, F.T.C. Docket No. 9064, Trade Reg. Rpts. No. 409 Pt. II (CCH) (Oct. 30, 1979) (forbidding advertising and price restraints). The majority opinion will hinder attempts by doctors, consumers and government to continue the process of applying Sherman Act principles to health care.

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[9] The legal profession has been the recent subject of antitrust reform. The changes necessitated by adherence to the antitrust laws do not appear to have inflicted serious damage on the profession or its clients. *See* Weller, *supra,* at 101.

The alternative to increased competition, partly secured through private and government enforcement of the antitrust laws, is probably total government control.[10] Few people consider this an appealing option. The choice, however, is not ours to make. We need only follow the mandate of the Sherman Act, which requires that competitive forces be allowed free rein. Only Congress can declare that health care is to be exempted from this mandate.

It might be argued that the challenged practice should not now be judged under a per se rule because courts have not yet had enough experience with this type of restraint to form a clear judgment about its competitive effects. *See Broadcast Music, Inc. v. Columbia Broadcasting System,*

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[10] *See generally* Enthoven. *Rx for Health Care Economics*, 59 Hosp. Prog. 44 (Oct. 1978); Havighurst, *Controlling Health Care Costs*, 1 J. Health Politics, Policy & Law 471 (1977); Havighurst & Hackbarth, *Private Cost Containment*, 300 N.Eng J. of Med. 1298 (1979); McClure, *On Broadening the Definition of and Removing Regulatory Barriers to a Competitive Health Care System*. 3 J. of Health Politics, Policy & Law 303 (1978).

Inc., supra.[11] This appears to be the thrust of the majority opinion. Such an argument is inappropriate here, because courts long ago determined that price tampering and maximum price-fixing among competitors lack significant competitive virtues and are therefore per se illegal. Even if this were the first judicial examination of this form of restraint, its anticompetitive vices are egregious and its procompetitive features nonexistent, so that this Court could declare it to be within the per se rules.[12]

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[11] In *Broadcast Music* the Supreme Court's major concern was the danger of too-quick characterization of conduct as price-fixing. Placing activity in the per se illegal price-fixing category essentially forecloses the issue of liability against the defendant. Therefore, care must be taken to ascertain that the conduct is indeed a traditional form of price-fixing, or a variant displaying similar anticompetitive aspects. The Court felt that defendant's behavior in *Broadcast Music* was not traditional price-fixing. 441 U.S. at 23 ("the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors"). Defendant was already subject to antitrust decrees, *id.* at 10-16, and was seen as performing a middleman function, *id.* at 19-23. *See* Comment, 91 Harv.L.Rev. 488 (1977) (author's analysis apparently followed by Supreme Court).

Here we are examing conduct which is a customary form of price-fixing between competitors. 441 U.S. at 8 ("[A]greements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the per se category."), and the deficiencies of "analysis by characterization" are not a problem. In my view, the fact that defendants' activity is conventional price-fixing makes this second area of inquiry unnecessary in this case. What is different here is not the challenged practice itself, but the industry in which it occurs. As I stated above at pages 6-8, that difference should not require abandonment of the per se rules.

[12] Civil liability under the Sherman Act may be predicated on a finding of either an unlawful purpose or an anticompetitive effect *McLain v. Real Estate Board of New Orleans, Inc.* 100 S.Ct. 502 (1980); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13. (1978). Defendants' purpose here was to fix prices and to suppress competition. These are per se unlawful purposes. It may not be necessary to assess the actual competitive effects of the controverted behavior where the unlawful purpose is clear.

Three of the harms engendered by maximum fee-setting are elimination of the freedom of individual sellers and buyers to determine prices, the possibility that the "maximum" price is in reality being used to establish a price floor or price uniformity, and the use of a maximum price structure to inhibit entry of competing forms of health care delivery which might capture a significant market share and deflect income from traditional fee-for-service physicians. *See Albrecht v. Herald Co., supra,* at 152-53; L. Sullivan, *Handbook on the Law of Antitrust* § 78, p. 210-11 (1977); Havighurst, *supra,* at 377; Havighurst & Kissam, *supra,* at 55 68; Kallstrom, *supra,* at 650, 681-83. The record indicates that these harms were intended and have occurred in Arizona.

Defendants claimed that doctors were threatening to leave the Foundations if they could not increase fees. This is an admission that freedom of individual physicians to determine prices has been abolished. Similarly, third-party payors are unable to individually negotiate a lower fee. They are in a take-it-or-leave-it situation. Letters exchanged among doctors, specialty groups, and the defendants show that the fee schedules were not attempts to set a true ceiling price, but were designed to fix *the* fee which doctors would receive for performing a particular service. Finally, defendants have quite openly stated that their purpose is to protect fee-for-service medicine against competing forms of health care delivery. While the defendants may take steps to preserve traditional forms of business, they may not use restraints of trade to do so. It is not necessary to find predatory pricing to establish that defendants' activity had the goal of unlawfully suppressing competition.

The Foundations' plan is a cozy arrangement for both doctors and third-party payors and it diminishes their incentives to control costs. Assignment of benefits by patients covered under Foundation-approved insurance plans is apparently automatic. These claims are submitted for payment directly to the Foundations, eliminating third-party

review of bills. When doctors vote to raise the level of reimbursement, insurance companies are notified in advance so that they can increase premiums to cover their higher costs. The entire system is designed to avoid providing anyone with an incentive to control costs. In addition, this system of payment appears to have been created to tie up a large percentage of doctors and third-party payors by generating high revenues for them. This would discourage them from exploring alternate, more efficient forms of health care delivery and serves to insulate physicians' incomes from any competitive pressures. The only party who does not benefit is the consumer, who must pay ever greater amounts for medical care.

In light of the total absence of real incentives for any of the plan's participants to limit fees, it is misleading to suggest that a redeeming virtue of the maximum fee schedule is cost control. A detailed economic analysis is not always necessary to understand the purpose or effect of a particular activity. Logic and common sense tell us that it is unreasonable to expect that a combination of medical providers might willingly take measures which could reduce their income and which would require changes in the way they have traditionally conducted business.[13] This is especially true when the providers are doctors, who have a long history of resisting any challenge to fee-for-service medicine. Steps to check costs will have to be initiated by informed consumers with a wider competitive choice or, more likely, from third-party payors acting on behalf of consumers.[14] These intiatives will occur only if the power of physicians is decreased in relation to these parties. Allowing doctors to set fees certainly does not improve the situation. If the fee schedule established by the defendants were abolished, it could be expected that third-party payors would be able to negotiate with each physician or health care delivery unit individually, and might be able to insti-

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[13] *See* Havighurst & Kissam, *supra*, at 68.

[14] *See* Havighurst. *Controlling Health Care Costs*, *supra*, at 485.

tute genuine attempts to control costs. Doctors would be encouraged to find methods of doing business which would lower their fees and allow them to increase their share of third-party payor business. In short, a market with more competitive features could be brought into existence.

I do not agree with the majority's belief that the relevant inquiry is whether fees are higher or lower as a result of the defendants' conduct. I am confident that the fee schedule does have the effect of raising prices, and that in its absence consumers would ultimately obtain less expensive medical care. *See* Kallstrom, *supra*, at 650. The majority's emphasis on the level of fees, however, is a version of the "reasonableness of prices" justification for price-fixing. This defense has been repeatedly rejected. *National Society of Professional Engineers v. United States*, *supra*, at 689; *United States v. Trenton Potteries, Co.*, 273 U.S. 392, 397 (1927). Lower prices are not the sole measuring rod of competitive conditions, nor are they neccessarily the ultimate goal of the Sherman Act. That goal is the absence of restraints on market forces. *See Reiter v. Sonotone Corp.*, 99 S.Ct. 2326, 2332 (1979) ("essence of the antitrust laws is to ensure fair price competition in an *open* market" (emphasis added)); *National Society of Professional Engineers v. United States*, *supra*, at 692 (restraint illegal because it impedes the ordinary give and take of the marketplace); *Goldfarb v. State Bar of Virginia*, *supra*, at 785 ("Nor was it necessary for petitioners to prove that the fee schedule raised fees. Petitioners clearly proved that the fee schedule fixed fees and thus 'deprive[d] purchasers or consumers of the advantages which they derive from free competition' " (cites omitted)); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1950) ("Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.") Congress has decided that an open market

will result in public benefits, which may include lower prices. If these benefits do not result, Congress must rectify the problem, not the courts. Removal of the fee schedule here, however, clearly will be favorable to the general public.

The level or reasonableness of agreed-upon prices is also irrelevant because part of the danger in such agreements is the aggregation of competitors. Even though their initial price-tampering may seem benign, combinations of competitors possess considerable power which inevitably will be abused. *See United States v. Trenton Potteries, supra.* The Sherman Act requires that these consolidations of power be stopped in their infancy.

The fee schedule here presents serious competitive problems.[15] The only justification advanced on its behalf, cost control, is illusory and nonexistent. Based on an assessment of its competitive impact, this fee schedule should be subject to the per se standards traditionally applied to price-fixing.

Finally, even if the rule of reason is the correct standard by which to judge defendants' activities, a detailed economic analysis of the industry is not necessary. This agreement to fix fees is so plainly anticompetitive that it is an unreasonable restraint of trade on its face. *See National Society of Professional Engineers v. United States, Supra.*

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[15] The fee schedule also poses potential anticompetitive problems as a price information exchange. The schedule was widely disseminated and could be used by doctors who were not Foundation members and could be used to bill clients not covered by the third-party payors. In this way the schedule would have an even greater impact on prices. This price information sharing relates to the level of price and does not seem to have a market-perfecting function. As such it is a particularly dangerous. *See United States v. United States Gypsum Co., supra,* at 441 n.16; L. Sullivan, *supra.* at §§ 93-96; Posner, *Information & Antitrust,* 67 Geo.L.J. 1187 (1979).

Because no in-depth study is necessary and because it is obvious that the practice is illegal, Arizona's likelihood of success is extremely high. This contributes to the district court's error in refusing preliminary relief.

The majority counsels a cautious approach. The truly circumspect path would be to assume, until it is proven otherwise, that the per se rules, which have arisen from long experience with price tampering, are fully applicable to physician fee-setting. Because the district court used erroneous legal premises and abused its discretion in weighing the preliminary injunction factors, this Court should either grant preliminary relief to plaintiff or order the district court to reconsider its decision to deny a preliminary injunction.

Filed—APR 28 1980
Richard H. Deane, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
Plaintiff-Appellant,
v.
MARICOPA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; MARICOPA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation; PIMA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; and PIMA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit coporation,
Defendants-Appellees.

No. 79-3427

STATE OF ARIZONA
Plaintiff-Appellant,
v.
MARICOPA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; MARICOPA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation; and PIMA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation,
Defendants-Appellees.

No. 79-3612

ORDER

Before: SNEED and KENNEDY, Circuit Judges, and LARSON,* District Judge

*Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation

The opinion filed in this case on March 20, 1980 is corrected as follows: Pages 11 and 12 are replaced by the attached pages and Footnote No. 7 is added.

Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich. L. Rev. 373, 435-40 (1974); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L. J. 284 (1977). As these authorities illustrate, however, there is nothing like agreement concerning the signs by which predation is identifiable.[6] Without deciding what the proper identifying signs may be, we are confident that none is revealed by this record. Moreover, the evil of predatory pricing is that it makes possible an ultimate capture of monopoly profits. Were prices maintained at the predatory level indefinitely the case against predatory pricing would more resemble that against suicide than that against monopolies.

The question whether the practice of which the appellant complains is sheltered from antitrust challenge by the McCarran-Ferguson Act, 15 U.S.C. § 1012, is not before us.[7] For the purposes of this appeal we assume that the practice of which the appellant complains was not "the

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[7] The district court reasoned that since

> the agreements between physicians participating in the foundation-approved plans and the insurers underwriting the plans . . . spread no risk peculiar to the business of insurance, the McCarran-Ferguson Act exemption does not apply to exempt the defendants' conduct from possible antitrust liability . . . .

Arizona v. Maricopa County Medical Society, No. CIV-78-800 PHX WPC (D. Ariz. June 11, 1979) (memorandum and order), Designated Record at 22-24. The parties before us have not attacked that holding. Recently, however, the Fourth Circuit decided that a chiropractors' association performing peer review and fee supervision on behalf of health insurers was within the exemption. Bartholomew v. Virginia Chiropractors Ass'n, Nos. 78-1734, 78-1735, 78-1736 (4th Cir. Nov. 20, 1979). The *Bartholomew* court explained that "the procurement of drugs," with which Group Life and Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979) dealt, was "admittedly an act only thinly tangential to the business of insurance," whereas the chiropractors' association played a part in insurance as "a single, composite business." *Bartholomew*, *supra*, at 12. We express no opinion regarding the validity of this distinction.

business of insurance." No more was held with respect to the practice involved in *Royal Drug*. The issue whether that practice violated the antitrust laws expressly was not decided. Here we confront precisely that type of issue and merely hold that the challenged practice is not a per se violation.

We conclude by observing that we draw comfort from the Supreme Court's reiteration in *National Society of Professional Engineers, supra*, 435 U.S. at 696 n.22, of its statement in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) that marketing restraints that regulate professional competition may pass muster under the Rule of Reason even though similar restraints on ordinary business competition would not. We believe this recognizes that a restraint may serve the public, the transcendent end of all professions, even though its presence in a purely commercial setting would violate the antitrust law. *See Professional Engineers, supra*, 435 at 696 & n.22; *Boddicker v. Arizona State Dental Association*, 549 F.2d 626 (9th Cir. 1977). There is sufficient probability of the challenged practice in this case being sheltered by this principle to justify our refusal to brand it as a per se violation.

Affirmed.

Filed—NOV 19 1979
Richard H. Deane
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
Plaintiff-Appellant,
v.
MARICOPA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; MARICOPA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation; PIMA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; and PIMA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation,
Defendants-Appellees.

No. 79-3427

STATE OF ARIZONA,
Plaintiff-Appellant,
v.
MARICOPA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; MARICOPA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation; and PIMA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation,
Defendants-Appellees.

No. 79-3612

ORDER

Appeal from the United States District Court
for the District of Arizona

Before: SNEED and KENNEDY, Circuit Judges, and LARSON,* District Judge.

The stay granted in this court's order of August 31, 1979, No. 79-3427, is hereby dissolved, and the orders of the lower court denying preliminary injunctions in these consolidated cases are affirmed. With respect to the interlocutory appeal in No. 79-3612, we conclude that on the present state of the record the defendants' conduct should not be considered a per se violation of the Sherman Act, 15 U.S.C. § 1.

An opinion by the court will be filed in due course.

LARSON, District Judge, Dissenting:

I respectfully dissent.

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) established that professional price-fixing is subject to a per se analysis under the Sherman Act. I see nothing in the nature of the medical profession or this particular arrangement which would dictate application of a lesser standard. Therefore, I dissent from the lifting of the stay.

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*Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

Filed—JUN 5 1979
W.J. Furstenau, Clerk
U.S. District Court
For The District of Arizona

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA, Plaintiff, vs. MARICOPA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; MARICOPA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation; PIMA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; and PIMA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation, Defendants.	No. CIV-78-800 PHX WPC MEMORANDUM AND ORDER

The State of Arizona has charged the Maricopa County Medical Society, Maricopa Foundation for Medical Care, Pima County Medical Society and Pima Foundation for Medical Care with violations of section 1 of the Sherman Act, 15 U.S.C. § 1, and the Arizona Uniform State Antitrust Act, A.R.S. §§ 44-1401 *et seq.* Arizona, in particular, asserts that the defendants have combined and conspired with others to fix, raise and maintain prices charged by doctors, and to establish and maintain systems for determining prices charged by doctors which include establishing and maintaining relative value schedules and conversion factors. Maricopa Foundation for Medical Care and Pima Foundation for Medical Care are associations of doctors. The

foundations approve and administer insurance plans underwritten by private insurers. The foundation-approved insurance plans allegedly offer an alternative to health maintenance organizations.

It is undisputed that the foundations set the maximum amount to be paid physicians who agree to provide services to patients who are enrolled in insurance plans approved by the foundations. It is further undisputed that the doctors who agree to participate in the foundation-approved plans are free to set the prices they charge their patients.

Maricopa Foundation has moved to dismiss the complaint for failure to state a claim, arguing that any conduct that would otherwise constitute an antitrust violation is exempt from antitrust liability by virtue of the McCarran-Ferguson Act, 15 U.S.C. § 1012. Arizona has moved for partial summary judgment determinations as to subject-matter jurisdiction and liability.

The McCarran-Ferguson Act exempts from the Sherman Act that conduct which constitutes the business of insurance and which is regulated by state law. *See* 15 U.S.C. § 1011 *et seq.* The Supreme Court has recently narrowly construed the statutory phrase "the business of insurance" to exclude an arrangement where insurance companies agreed with pharmacists on the maximum amount that the pharmacists would be reimbursed for prescriptions they filled. *See Group Life & Health Ins. Co. v. Royal Drug Co., Inc.*, 99 S.Ct. 1067 (1979). The Court held that to be within the McCarran-Ferguson Act exemption, the conduct must involve the underwriting or spreading of a risk. *Id.* at 1073-74.

The defendants have argued that the agreements between physicians participating in the foundation-approved plans and the insurers underwriting the plans spread the risk that the cost of providing services to a foundation policyholder will be more than the maximum amount a participating physician would receive. Yet every contract

for the sale of goods or services in the future at a specified price protects the parties against future fluctuations in the market price. Such an underwriting of a risk is not peculiar to the "business of insurance."

The risk that is peculiar to the "business of insurance" is the risk that policyholders cannot afford the services of a physician when needed. The participating insurance companies underwrite or assume this risk in return for the payment of premiums. The effect is that the risk is spread among all policyholders such that the magnitude of the risk to the individual policyholder is reduced. Merely because an insurance company acts to reduce the risk that it has underwritten does not directly further underwrite or spread the risk that the policyholders sought to insure against. The obligations that the participating insurance companies have incurred remains constant. How they go about satisfying that obligation does not involve the business of insurance since a reduction in liability and thus the risk they have assumed does not change the risk against which the policyholder obtained insurance. The Supreme Court in *Royal Drug* wrote in relevant part:

> The fallacy of the petitioners' position is that they confuse the obligations of Blue Shield under its insurance policies, which insure against the risk that policyholders will be unable to pay for prescription drugs during the period of coverage, and the agreements between Blue Shield and the participating pharmacies, which serve only to minimize the costs Blue Shield incurs in fulfilling its underwriting obligations . . . .
>
> The . . . Agreements . . . do not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield . . . . Such cost savings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the "business of insurance."

Group Life & Health Ins. Co. v. Royal Drug Co., Inc., *supra*, 99 S.Ct. at 1074-75. Because the agreements between the defendants and the insurance companies underwrite or spread no risk peculiar to the business of insurance, the McCarran-Ferguson Act exemption does not apply to exempt the defendants' conduct from possible antitrust liability and the defendants' motion to dismiss is denied.

Subject-matter jurisdiction under federal antitrust law is co-extensive with the Congressional power under the Constitution to regulate interstate commerce. *United States v. South-Eastern Underwriter's Ass'n*, 322 U.S. 533, 558-59, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Whether the Court has subject-matter jurisdiction over the complaint depends on whether the acts allegedly restrained by the acts complained of occur in the flow of commerce, or whether those acts, although local, substantially affect interstate commerce. *See Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743, 96 S.Ct. 1848, 1851-52, 48 L.Ed. 2d 338 (1976). The alleged price-fixing of services, goods and products sold by participating physicians to foundation policyholders presumably restrains the sale of the services, goods and products sold by the participating physicians. The sales are not interstate transactions, since the sales occur wholly within the state. No services cross state lines and any goods or products that cross state lines are no longer in the flow of interstate commerce when sold at retail. *See* P. Areeda & D. Turner, Antitrust Law ¶¶ 31-32 (1973). That the doctors are paid with funds that cross state lines according to contracts that cross state lines or prescribe drugs that cross state lines does not make the services or products they sell something that is in the flow of interstate commerce.

However, it cannot be disputed that health insurance is an interstate business where premiums and payments on claims cross state lines. The alleged price-fixing affects the sale of services by physicians and the sale of services rendered by physicians directly affects the premiums and payments that cross state lines. It is undisputed that the

amount of premiums and payments on claims that annually cross state lines exceeds the amounts involved in *Hospital Building Co. v. Trustees of Rex Hospital, supra.* Thus, the criteria of *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 575 (1975), that there must be both substantial interstate commerce and a necessary or integral relationship between the allegedly restrained activity and the interstate commerce are satisfied, thereby establishing subject-matter jurisdiction. *See Ohio v. Ohio Medical Indemnity, Inc.,* 1976-2 Trade Cases (CCH) ¶ 61,128 (S.D. Ohio 1976). *See also De Voto v. Pacific Fidelity Life Ins. Co.,* 516 F.2d 1, 5 (9th Cir.), *cert. denied,* 423 U.S. 894 ("Interstate insurance transactions fall within the definition of interstate commerce as that term is applied pursuant to federal antitrust regulation, and '[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' ").

Although the question of subject-matter jurisdiction is normally addressed by a motion to dismiss and a finding of lack of subject-matter jurisdiction requires dismissal, finding jurisdiction does not preclude entering partial summary judgment on that issue. *See Page v. Work,* 290 F.2d 323 (9th Cir.), *cert. denied,* 368 U.S. 875 (1961). Because the Court finds it has subject-matter jurisdiction over the plaintiff's antitrust claim, the motion by the plaintiff for partial summary judgment on the issue of subject-matter jurisdiction is granted.

Based on the affidavit of Anthony D. Mitten, it is clear that the defendant Maricopa Foundation for Medical Care (and presumably the Pima Foundation for Medical Care as well) sets the maximum fees paid by the insurance companies underwriting foundation-approved plans to the physicians associated with the foundation for services performed by them on patients covered by the foundation-endorsed plans. That the participating physicians are free to charge whatever price they wish is of no consequence as

they have agreed in advance to accept in full satisfaction the amount determined by the medical foundation when the amount they charge exceeds that established by the foundation.

Price-fixing has for some time been viewed as per se unlawful. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). Under the per se approach, there is no inquiry into whether the challenged practice actually has an anticompetitive effect. The per se rule has been applied to fixing maximum prices as well as minimum prices. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951). No evidence has been submitted that the insurance companies individually determined the maximum prices to be paid and that the physicians individually agreed to those terms which presumably would preclude finding any antitrust violation even under a per se analysis. *See* Department of Justice Clearance Letter, January 15, 1968, Appendix E, Amicus Curiae Brief of the Blue Shield Association, Group Life and Health Ins. Co. v. Royal Drug Co., Inc. (1977).

The defendants urge that the challenged practices should be analyzed under the "Rule of Reason" approach. Under the Rule of Reason approach, an inquiry is made to determine whether the purpose or effect of the practice in question would significantly hamper competition. *See* Sullivan, Handbook on Antitrust §§ 68-72 (1977). Although the per se approach avoids inquiry into difficult economic issues, a recent antitrust trend appears to be emerging where the Rule of Reason is the preferred method of determining whether a particular practice is in violation of the antitrust law. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2D 568 (1977) (vertical restraints, formerly per se violations, are now to be analyzed under the Rule of Reason approach); *General Glass Co., Inc. v. Globe Glass and Trim Co.*, [1978-2] Trade Cases 75,487, 75,490 (N.D. I11. 1978) ("That all price-fixing is *per se* violative of antitrust laws is a concept that is presently

being revised in favor of a 'rule of reason' approach.") *See also* Handler, "Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977," 77 *Columb. L. Rev.* 979, 989 (1977):

> *Sylvania* marks not only the reinstatement of the rule of reason, but also a reawakening to the requirements of business .... It is clear ... that the courts will no longer have to wear per se blinders in passing upon the many business restrictions which do have "redeeming virtues" and may actually help to promote competition."

Additionally, the two Supreme Court cases invalidating maximum price-fixing, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., supra*, and *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), need not be read as establishing a per se rule. According to one commentator,

> [m]ost writers have determined that *Kiefer-Stewart* and *Albrecht* should not be read to denounce maximum RPM [resale price maintenance] under the per se rule. Unlike normal per se cases, these decisions were not the culmination of a long series of rulings establishing that the challenged practice can rarely, if ever, be justified and that the usual evidentiary inquiry into purpose, power and effect would be wasteful. Nor did these decisions discuss the possible benefits and detriments to efficiency and competition posed by the restraint under attack, so as to conclude that virtually *no* defense would be successful, as have most per se cases. It is plain, moreover, that the results of *Kiefer-Stewart* and *Albrecht* can be explained by rule of reason analysis. Consequently, there is no need to read them as per se holdings condemning maximum RPM.

Kallstrom, "Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act," 1978 *Duke L.J.* 645, 666-68.

Another consideration in determining whether to apply the Rule of Reason approach is that a profession is involved here.

> It has long been recognized that the professions differ fundamentally from ordinary commercial businesses and, consequently, merit more liberal treatment under the antitrust laws. Courts have generally assumed that the professions exist for reasons in addition to the profit motive. The essence of the concept of "profession" is the power to self-regulate and to promote standards of practice that benefit the public at large as well as the individual practitioners.

Comment, "The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act," 11 *U. Mich. J. L. Reform* 387, 394 (1978). *See also* Note, "Application of the Antitrust Laws to Anticompetitive Activities by Physicians," 30 *Rutgers L. Rev.* 991, 1019 (1977) ("Recognizing that the per se rules were fashioned in a wholly commercial context, courts traditionally have not included highly regulated but traditionally noncommercial industries within the scope of those rules."). The Supreme Court has recognized the distinction between a purely commercial business and a profession, commenting in *Goldfarb, supra:*

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities and automatically apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could be properly viewed as a violation of the Sherman Act in another context, be treated differently.

421 U.S. at 788 N.17, 95 S.Ct. at 2013.

In *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355 (1978), the Supreme Court further indicated that conduct of professions allegedly in violation of the antitrust laws may be subjected to a Rule of Reason analysis. Although the Court concluded that no elaborate industry analysis was necessary to find that the challenged conduct was in violation of the antitrust laws, the Court did discuss at length the Rule of Reason, stating that "certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context." *Id.* 435 U.S. at _____, 98 S.Ct. at 1362. Nowhere did the Court state that the defendant could assert no defense that the conduct challenged was reasonable, only that the particular defense of protecting against inferior work was legally insufficient.

The Ninth Circuit, when confronted with an alleged tying arrangement, normally a per se violation, by a profession, wrote:

> [T]he Supreme Court does not require that the practices challenged here be treated the same as would be proper if dentistry were merely a commercial enterprise.
>
> As we interpret the Court, to survive a Sherman Act challenge a particular practice, rule, or regulation of a profession, whether rooted in tradition or the pronouncements of its organizations, must serve the purpose for which the profession exists, *viz.* to serve the public. That is, it must contribute directly to improving service to the public. Those which only suppress competition between practitioners will fail to survive the challenge. This interpretation permits a harmonization of the ends that both the professions and the Sherman Act serve.

Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626, 632 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977). Reversing the dismissal of the case and remanding the case for further proceedings to permit the defendants to show how the chal-

lenged conduct promoted the improvement of professional services to the public indicates that the Rule of Reason is to be applied when analyzing practices of professions alleged to be in violation of the antitrust laws. *See also Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976) (the challenged rule characterized as a refusal to deal and a group boycott was held to be more appropriately tested under the Rule of Reason than to be declared per se violative of the Sherman Act). It has been aptly observed that

> [a]lthough no firm consensus exists as to the social and economic goals of the Sherman Act, it is at least clear that per se rules arose out of the courts' experience with commercial activities whose purposes and anticompetitive effects differ significantly from those of the professions. The mechanical application of per se rules of illegality in the professional setting contradicts the basic rule that only unreasonable restraints are condemned by the Sherman Act .... [W]ithout the benefit of long experience with the professions in the antitrust arena, the conclusions garnered from traditional commercial practices should not be carried over unthinkingly to professional practices.

Comment, *supra*, 11 *U. Mich. J. L. Reform*, at 415.

In light of the above, the Court concludes that the Rule of Reason approach should be used in analyzing the challenged conduct in the instant case. Choosing the Rule of Reason approach precludes granting the plaintiff's motion for partial summary judgment on the issue of liability because there is insufficient evidence as to the [purpose and effect of the allegedly unlawful practices and the power of the defendants.] As a consequence of adopting the Rule of Reason, the December 18, 1978, order of the Court denying defendant Maricopa Foundation's motion for an order compelling discovery of certain information and documents such as the relative value schedules, unit conversion factors or fee schedules used by the plaintiff is vacated. Under the Rule of Reason approach, such information is relevant in

determining the purpose and effect of the challenged conduct. Therefore,

IT IS ORDERED:

1. The defendants' motion to dismiss based on the McCarran-Ferguson Act exemption is denied.

2. The plaintiff's motion for partial summary judgment on the issue of subject-matter jurisdiction is granted.

3. The plaintiff's motion for partial summary judgment on the issue of liability is denied with leave to file a similar motion based on additional evidence if appropriate.

4. The December 18, 1978, order of the Court denying defendant Maricopa Foundation's motion for an order compelling discovery is vacated.

DATED June 5, 1979.

United States District Judge

CIVIL MINUTES OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

PLACE: Phx.

☐ HON. WALTER E. CRAIG ☐ HON. CARL A. MUECKE
☑ HON. WILLIAM P. COPPLE

☐ HON. _____

Deputy Clerk	Court Reporter
___ Vera Whiteside	___ Lloyd Weyenberg
___ Rita Zambonini	___ Gloria Frandle
✓ Becky Daudet	✓ Thomas Stalcup
___ Dorothy Kennedy	
___ _____	___ _____

CIV- 78-800 Phx.

State of Arizona (Plaintiff) vs. Maricopa County Medical Society, et al (Defendant)

DOCKET NUMBER	MATTER ON FOR HEARING
(105)	Pltf's motion for summary judg. and permanent injunction and motion for reconsideration of memo. and order of June 5, 1979

APPEARANCES

Patricia Metzger pres. for Atty General
Philip Berelson and Ken Nyman pres. for Defts.

MINUTES

Order motion for reconsideration denied
Motion for summary judg. Denied
and interlocutory appeal granted and pltf. to submit certificate

___U/___ ___N/___ ___ Vacated Con't to: _____

DOCKETED BY:

DATE: 8-6-79 /s/
Deputy Clerk

Filed—AUG 8 1979
W.J. Furstenau, Clerk
U.S. District Court
For The District of Arizona

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

STATE OF ARIZONA, Plaintiff, vs. MARICOPA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; MARICOPA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation; PIMA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; and PIMA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation, Defendants.	No. CIV-78-800 PHX WPC CERTIFICATE AND ORDER

IT IS HEREBY ORDERED that:

The Order of this Court entered June 5, 1979 is amended by addition of the following: This Court's determination that the Rule of Reason approach should be used in analyzing the challenged conduct in the instant case to determine whether a violation of Section 1 of the Sherman Act has occurred involves a question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the Order denying plaintiff's motion for partial summary judgment on the issue of liability may materially

advance the ultimate determination of the litigation. Therefore, the foregoing Order and determination of the Court is certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

DATED this 8 day of August, 1979.

Judge of the United States District Court

Filed—MAY 30 1980
Richard H. Deane, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
Plaintiff-Appellant,
v.
MARICOPA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; MARICOPA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation; PIMA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; and PIMA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit coporation,
Defendants-Appellees.

No. 79-3427

STATE OF ARIZONA
Plaintiff-Appellant,
v.
MARICOPA COUNTY MEDICAL SOCIETY, an Arizona non-profit corporation; MARICOPA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation; and PIMA FOUNDATION FOR MEDICAL CARE, an Arizona non-profit corporation,
Defendants-Appellees.

No. 79-3612

ORDER

Before: SNEED and KENNEDY, Circuit Judges, and LARSON,* District Judge

*Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

Plaintiff-Appellant's Petition for Rehearing and Suggestion of Appropriateness of Rehearing In Banc is ordered filed.

Filed—JUN 18 1980
Richard H. Deane, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ARIZONA,
Plaintiff-Appellant,
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Defendants-Appellees.

No. 79-3612

ORDER

Before: SNEED and KENNEDY, Circuit Judges, and LARSON,* District Judge

*Honorable Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.